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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 346

MRS. GLADYS LEITH HOLMES,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation, MUSGROVE INSURANCE AGENCY, a Partnership, Composed of W. T. Musgrove and W. R. Cadenhead, and W. T. MUSGROVE and W. R. CADENHEAD, Individually,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit.

FRANCIS H. HARE,
TRUMAN M. HOBBS,
Counsel for Petitioner.

Of Counsel:
HARE, WYNN and NEWELL,
703 Comer Building,
Birmingham, Alabama,
GODBOLD, HOBBS & COPELAND,
330 Professional Center Building,
Montgomery, Alabama.

St. Louis Law Printing Co., Inc., 416 N. Eighth Street. CEntral 1-4477.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 16, 1959.

OPINIONS BELOW.

The judgment of the District Court (R. 790-791) is unreported. The opinion of the Court of Appeals (R. 819) is reported at 266 F. 2d 269.

JURISDICTION.

The judgment of the Court of Appeals was entered April 16, 1959 (R. 845). Petitioner filed her application for rehearing on May 6, 1959. It was denied on May 28, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Where petitioner was assured of a trial by jury in the state courts of Alabama, can a Court of Appeals in a diversity case, deny petitioner a jury trial by refusing to apply the state scintilla of evidence rule and substitute therefor a more stringent federal test, thereby depriving petitioner of the benefit of the verdict of the jury and the action of the trial court in refusing to set aside that verdict?

2. Was the evidence in this record sufficient to support the verdict of the jury as found by the trial judge and was petitioner effectively denied a trial by jury in violation of the Seventh Amendment of the Constitution by the action of the Court of Appeals in directing judgment for respondent on the ground that the evidence was not sufficient to support the jury's verdict?

STATUTES INVOLVED.

The Seventh Amendment of the United States Constitution is involved:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Tit. 9, Secs. 68, 69, 73, of the Alabama Code, 1940, are involved. These Sections are printed in Appendix A.

STATEMENT.

This case was commenced in the United States District Court for the Northern District of Alabama. Federal jurisdiction rested on diversity of citizenship, 18 U. S. C. 1332.

Mrs. Gladys Holmes, petitioner, sued respondent, Continental Casualty Company, for the proceeds of an accident and health policy insuring the life of her deceased husband, Oliver Wendell Holmes, while flying as a pilot. Mrs. Holmes claimed that coverage was effected by oral binder communicated by respondent's agent, W. T. Musgrove, and that her husband relying on the oral binder piloted an airplane which crashed causing his death. Musgrove, respondent's licensed agent, admitted that he made the oral binder as claimed by petitioner (R. 127, 217, 230). Respondent's principal defense was lack of authority of its agent Musgrove to bind it. There was no written agency contract between respondent and Musgrove.

Respondent impleaded as third party defendants the Musgrove Insurance Agency and the two partners individ-

nally, alleging that none of the third-party defendants had actual authority to make the oral agreement insuring Holmes and, therefore, if respondent was liable to petitioner because of any apparent authority, then the third-party defendants were in turn liable to respondent.

The verdicts of the jury were in favor of petitioner, for the amount of the policy, $50,000, and in favor of the third party defendants. Trial Judge Hobart Grooms refused to set the verdict aside, entering judgment for petitioner.

The Court of Appeals reviewed the evidence and held that there was "no substantial evidence that Musgrove had either actual or apparent authority to orally bind Continental Casualty Company" 266 F. 2d at 276. It thereupon reversed and remanded with directions to enter judgment for respondent.

The binder in suit was not given by Musgrove until 1957. It covered Holmes while piloting an aircraft. In order to understand Musgrove's authority—both actual and apparent—if is necessary to state the facts concerning the original coverage issued through Musgrove by Continental insuring Holmes as a passenger in an aircraft.

In early 1956, petitioner's husband contacted Musgrove, owner of Musgrove Insurance Agency of Florence Alabama, relative to his insurance needs. Holmes executed an application for a $50,000 Aviation Accident Policy on a form provided by Queen Insurance Company for which Musgrove was an agent. This application was forwarded to the Atlanta office of Queen Insurance Company. Because this company already had considerable exposure under a policy covering the aircraft identified in the application, the representative in Atlanta sought to place the insurance with another company.

Herbert Holland, Jr., manager of respondent's southeastern branch office, was contacted. He talked by tele-

phone with Musgrove in February, 1956, and in the course of their conversation Holland stated that insurance coverage for Holmes in the amount of $50,000 was "then in effect with Continental Casualty" (R. 187). Following this telephone conversation, Musgrove told Holmes that he was insured with respondent for $50,000 (R. 191). Subsequent to the telephone conversation, Holland wrote a letter to Musgrove dated February 23, 1956, advising that Continental was holding "on binder" aviation accident coverage in the amount of $50,000 for Holmes and another applicant, James Culver, while riding "as passengers" in identified aircraft (R. 42). The letter stated that the insurance was "effective February 17, 1956" and requested that the enclosed Continental application blanks be completed and returned. It was February 27, 1956, before Musgrove had the applications executed and returned to Holland. It was mid-May of 1956 before the policies were issued. As respondent conceded this original insurance was held "on oral binder" (R. 181).

Holland appointed Musgrove "a full agent for the aviation accident division, special risk department, of the Continental Casualty Company to secure business in Florence, Alabama" (R. 202. Emphasis added). He also told Musgrove that he as to receive a full agency commission on all insurance and that Continental's insurance would be handled like all of Musgrove's other business (R. 203).

This reference to Musgrove's appointment as a "full agent" and handling Continental's insurance like all of Musgrove's other business is particularly significant because respondent was aware at the time that Musgrove was general agent for other insurance companies. See respondent's answer to interrogatory No. 16 (R. 274).

Musgrove was not a licensed agent of respondent at the time respondent insured Holmes by its oral binder

on the original passenger insurance. Respondent mailed the Holmes and Culver policies direct to Musgrove without countersignatures of a licensed resident agent as is required by Alabama law. After a delay of approximately three months, respondent procured an Alabama license naming Musgrove an agent of Continental Casualty Company with Power 4, "Miscellaneous casualty, including official surety bonds". Power 12 on this form was one for "a solicitor", but respondent in procuring Musgrove's license from the Alabama Department of Insurance checked Power 4—the highest power capable of being indicated on the form furnished by the Department (R. 98, Pl's Ex. 5). On May 28, 1956, respondent sent Musgrove his agent's license from the Department of Insurance. Musgrove then countersigned the Holmes policy and delivered it to Holmes. Thus, from February 17, 1956, until some time in late May, Holmes was insured with respondent by an oral binder, the knowledge of the binder being communicated to him orally by Musgrove.

Musgrove's authority to bind the defendant as a General Agent or his implied authority to bind the defendant was shown by many documents discovered by motion to produce. For example, Holland, respondent's Southeast Branch Manager, initiated the application to license Musgrove as respondent's agent in Alabama. On that application Holland described Musgrove as a "General Agent" (R. 486, Pl's Ex. 13).

Also discovery produced a letter (R. 579) from Holland to the Musgrove Insurance Agency saying:

> "The most practical solution is for us to acquire for you an Accident and Health License with the Continental Casualty Company. **This would permit the signature on the above two policies to stand.**" (Emphasis added.)

The two policies were in evidence (R. 46, 47, and 48) showing that the signatures mentioned referred to Musgrove's act in countersigning policies issued in Alabama.

After respondent had applied for a license for Musgrove with the Alabama Department of Insurance, Holland wrote Musgrove:

> "Please be assured that we intend **in all ways to honor your Continental licensing** and we want to do as much business with you as possible . . . My personal division, Aviation, encompasses all kinds of specialties and travel risks . . . I hope that I shall be hearing from you regularly." Emphasis added (R. 209).

On Dec. 10, 1956, Musgrove wrote Holmes a letter concerning Holmes' policies in force. This letter stated in part:

> "Aviation Accident Policy which should be rewritten since you are flying a plane by yourself; this is written on a passenger basis, and not as pilot, but you should have this changed to cover you as pilot of the plane, and I would appreciate your considering this and agreeing to change it. It will cost you more money but will give you the protection that is needed. This policy was charged to Pressure Concrete Company of Florence, and I think in all fairness, and I am sure you agree, that we should transfer this over to your account. Will appreciate very much your discussing this with me the next time we get together" (R. 89).

Musgrove had a conversation with Holmes on Jan. 3, 1957, in which Holmes told Musgrove that he wanted aviation accident insurance covering him as a pilot, and Musgrove told Holmes that he was covered from then on.

Musgrove made a notation reading: "Wendell Holmes Aviation Pilot (sic) . . ." and testified that he gave the memorandum to his partner Billy Cadenhead, for processing and getting the policy endorsed or a new one issued, whichever was necessary (R. 125, 126).

The next day, January 4, 1957, Cadenhead wrote Continental stating that Holmes wished to have "pilots coverage" under the $50,000 policy presently in force and requested necessary applications to complete the matter (R. 149, Def's Ex. 4).

After receipt of Cadenhead's letter, respondent through its representative Holland, replied as follows (R. 50):

"Oliver Wendell Holmes

AA-108708

"Dear Mr. Cadenhead:

"We will be delighted to entertain Mr. Holmes' (sic) application for Pilot Coverage. I am enclosing another application which we would like to have him complete and also a Pilot History Form which ~~also~~ must be submitted.

"Depending upon Mr. Holmes' experience and needs of the insurance, it is possible that our underwriters would not like to write as much as $50,000 principal sum for piloting. Completion of these two forms will help to determine this. If he should need only $25,000 while piloting, or that is all that could be written, we would be able to reduce the principal sum under the present policy to $25,000. All the present coverage is included in the Pilot Policy, so that he would have $50,000, just as he now has with $25,000, piloting. Of course, this is all problematical.

"Please let me know if I may be of further help."

After Cadenhead received the application and forms, he partially filled them in and delivered them to Holmes. On the night of February 20, 1957, Holmes brought the application and forms to Musgrove and signed them (R. 231). At that time Holmes referred to a statement in the form that coverage was not effected until the policy was issued and asked Musgrove if coverage was not actually in effect, explaining to Musgrove that he was flying daily (R. 230). Musgrove assured Holmes that the statement made no difference because Holmes was "under binder and it was just a matter formality of getting the document or the Policy to him" (R. 230).

The next day, Feb. 21, Holmes was killed flying as a pilot, having been orally assured of coverage by the same agent for respondent who gave him oral assurance of coverage on the prior policy, which admittedly was in force for more than three months on oral binder (R. 210).

Cadenhead took the application and pilot's history form to Atlanta on Feb. 25, and there met with Holland. Cadenhead testified that he told Holland on this occasion that Musgrove had told Holmes that Holmes had "the coverage" and that Holland did not then deny that Musgrove had the authority to bind Holmes (R. 661, 664).

There was no evidence in the entire record of any affirmative directive by respondent to limit the authority of Musgrove. Respondent had no agent in the State of Alabama superior to Musgrove (R. 121, 122).

REASONS FOR GRANTING THE WRIT.

I.

This case involves an important question about which there is a conflict in the Courts of Appeal in the various circuits. The Court of Appeals for the Fifth Circuit in

this diversity case has applied a federal test to determine whether the evidence was sufficient to support a jury verdict. As stated by the Court of Appeals, the test of sufficiency which it applied was whether there was **"any substantial evidence"** which supported the verdict (Emphasis the Court's). 266 F. 2d at 276. In footnote 5 of the Court's opinion and as authority for the proposition that the sufficiency of the evidence is measured by a federal test, the Court of Appeals cited one of its prior cases, **Reuter v. Eastern Air Lines** (5 C. A.), 226 F. 2d 443, 445.

In the **Reuter** case the author of the **Holmes** opinion stated:

> "In diversity cases, therefore, even since Erie, the scintilla of evidence rule prevailing in Alabama and in some other states has no application in the federal courts."

In the recent opinion of this Court in **Dick v. New York Life Insurance Co.**, 359 U. S. 437, 445, this Court acknowledged that "the lower courts are not in agreement" on this question. This Court cited **Rowe v. Pennsylvania Greyhound Lines** (2 C. A.), 231 F. 2d 922; **Cooper v. Brown** (3 C. A.), 126 F. 2d 874; **Lovas v. General Motors Corp.** (6 C. A.), 212 F. 2d 805, as representative of holdings by three of the Circuits that in diversity cases the sufficiency of the evidence is to be determined by a state test.[1] This Court then cited cases from three Circuits including the **Reuter** opinion from the Fifth Circuit for the conflicting view.

These conflicting opinions in the Circuit Courts cite decisions of this Court as authority for their irreconcilable

[1] Two other circuits appear committed to the view that federal courts in diversity cases will apply a state test to determine the sufficiency of the evidence. *Kyker v. Kyan* (7 C. A.), 126 F. 2d 952; *Twin City Hardwood Lumber Co. v. Dreger* (8 C. A.), 199 F. 2d 197.

views. For example, in this case, the Court of Appeals cited **Myers v. Reading Co.** (1947), 331 U. S. 477, 485, for the proposition that the sufficiency of the evidence is to be judged by a federal test. In **Gutierrez v. Pub. Service Interstate Transp. Co.** (2 C. A.), 168 F. 2d 678, the Court of Appeals for the Second Circuit relied on **Stoner v. N. Y. Life,** 311 U. S. 464, for the proposition that the sufficiency of the evidence is determined by state law.

In the **Dick** case, this Court declined "to reach out to decide this important question" because (1) the Court of Appeals "appears to have applied the state standard," and (2) in "the context of this case, the two standards are substantially the same," and (3) in briefs and arguments both parties "assumed that the North Dakota standard applied." **Dick v. N. Y. Life Ins. Co.,** 359 U. S. 437, 445.

In the instant case, the Court of Appeals, by citing the **Reuter** opinion made emphatically clear that it rejected "the scintilla of evidence rule prevailing in Alabama." We will not detail here the evidence that abundantly satisfied the scintilla rule. In the second section of this petition, we will endeavor to show not only that the evidence met the scintilla test, but that the evidence was substantial enough to meet any recognized federal test for determining the adequacy of the evidence. We believe the Court of Appeals in the instant case not only erroneously refused to follow **Erie,** but in its refusal to permit the jury to resolve the conflicting evidence and inferences therefrom actually infringed rights of petitioner guaranteed by the Seventh Amendment. The Court of Appeals does not even suggest that the jury's verdict lacked the scintilla of evidence required by Alabama practice.

The reverse is true. By citing the **Reuter** case, the **Holmes** court properly suggests that if it had been ap-

plying the state scintilla rule it would have been forced to a different conclusion. The author of the **Holmes** opinion, a longtime Alabama practitioner, presumably was aware of the power of the scintilla rule in preventing Alabama courts from denying litigants trial by jury.

The Supreme Court of Alabama recently had occasion to express forcefully the limitation on its review of the sufficiency of the evidence.

> "In view of the rule in Alabama that in civil cases the question must go to the jury if the evidence or the reasonable inferences arising therefrom furnish 'a mere gleam, glimmer, spark, the least particle, the smallest trace, a scintilla' in support of the theory (Ex parte Grimmett, 228 Ala. 1, 152 So. 263), we are constrained to hold that the question of contributory negligence was for the jury and that there was no error in refusing the affirmative instructions requested by the defendant." **Ala. Great So. R. R. v. Bishop**, 265 Ala. 118, 89 So. 2d 738, 743.

In **Liverpool & London & Globe Ins. Co. v. McCree**, 213 Ala. 534, 105 So. 901, 904, the Supreme Court of Alabama stated:

> "The making of insurance contracts, oral and written, was discussed on former appeal. 210 Ala. 559, 98 So. 880. The burden of proof is the same, whatever the nature of such insurance contracts. The scintilla of evidence is the rule that prevails in this state; and, if there is evidence or inference therefrom unfavorable to the party requesting the general affirmative charge, it should be refused."

And see: **Cleveland Laundry Mfg. Co. v. Southern Steam Co.**, 204 Ala. 297, 85 So. 535; **Chesser v. Williams**, ... Ala. ..., 104 So. 2d 918; **U. S. Steel v. Matthews**, 261 Ala. 120, 73 So. 2d 239.

The circumstances which required this Court to stay its hand in the **Dick** case are not present here. A federal appellate court has here concededly applied a federal test different than the state test and has thereby deprived petitioner of the trial by jury assured to her by the rule of the Alabama courts.

We do not argue at length in this petition whether the view of the Fifth, Fourth and Tenth Circuits is correct, or that of the Second, Third and Sixth. See **Dick v. N. Y. Life**, 359 U. S. 437, 445. Extended argument seems more appropriate for brief in the event this Court agrees that this important question is now proper for review.

Petitioner submits, however, that the teachings of **Guaranty Trust Co. v. York**, 326 U. S. 99, reject the view that in diversity cases there is a different rule in the federal courts for determining the sufficiency of the evidence than would apply to the same litigants in the state court.

> "In essence, the intent of that decision **(Erie)** was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court. *The nub* of the policy that underlies Erie R. Co. v. Thompkins is that for the transaction the accident of a suit by a non-resident litigant in a federal court instead of a state court a block away should not lead to a substantially different result." **Guaranty Trust Co. v. York**, at p. 109.

By measuring the scope of its review by a "federal test" to the rejection of the state test, the Court of Appeals has denied petitioner the trial by jury that was guaranteed to her under the state practice. By way of understatement

"the outcome of the litigation in the federal court" was not "substantially the same."

In the recent case of **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525, this court strongly suggested that in the absence of "countervailing considerations" the federal court in diversity cases should follow state law in determining whether judge or jury resolved the issues. This Court stated:

> ". . . were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice," at p. 537.

In the **Byrd** case this Court found such "countervailing considerations" in "the federal policy favoring jury decisions of disputed fact," at p. 537.

In the instant case these two considerations (1) having "the outcome" the same in state and federal courts and (2) having a jury decide disputed facts, can be served only by granting petitioner in this diversity case the jury trial she was assured of having in the state court. Thus, the considerations in conflict in **Byrd** are here in harmony and require that this case be reversed.[2]

The case of **Stoner v. New York Life**, 311 U. S. 464, also seems to require that the test of the sufficiency of the evidence in diversity cases be the same in federal and state courts. The **Stoner** case is so treated by Courts of Appeal in at least three of the circuits. **Rowe v. Penn. Greyhound Lines** (2 C. A.), 231 F. 2d 922, 924; **Sierocinski v. E. I. Du Pont De Nemours & Co.** (3 C. A.), 118 F. 2d 531, 535;

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[2] In Green, *Protection of Jury Trial in Diversity Cases Against State Invasions*, 35 Texas L. Rev. 768, the author notes the consistent efforts of this Court to prevent local practices designed to deprive a litigant of his constitutional right to jury trial. And see *Beacon Theatres v. Westover*, ... U. S. ..., 79 S. Ct. 948, 952.

Lovas v. General Motors (6 C. A.), 212 F. 2d 805, 807. Despite the **York, Byrd** and **Stoner** cases, the different circuits are in square conflict. This Court should clearly decide this important question. Alabama courts bound by the scintilla rule would not have deprived petitioner of a jury trial. Petitioner should not be deprived of her judgment because of "the fortuitous circumstances of residence out of a State of one of the parties." **Guaranty Trust Co. v. York**, 326 U. S. 99, 112. Nor should she be deprived of her judgment because of "the fortuitous circumstances" that this case arose in the Fifth rather than in the Second, Third, Sixth, Seventh or Eighth Circuits. The important question which this Court would not "reach out" to decide in the **Dick** case is here squarely presented and should be resolved in favor of petitioner.

II.

In the foregoing section we pointed out that a scintilla of evidence should have been sufficient to protect petitioner's right to trial by jury. In this section we will show that not only was there such a scintilla of evidence, but that there was an abundance of probative evidence, more than sufficient to satisfy the "federal" standard purportedly applied by the Court of Appeals.

By reversing the trial court and rendering judgment for respondent despite petitioner's evidence, the Court of Appeals effectively deprived petitioner of her right to trial by jury in violation of the Seventh Amendment. This Court has recently re-avowed its determination to protect this right of trial by jury from any evasion.

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scruti-

nized with utmost care." **Beacon Theatres v. Westover**, . . . U. S. . . ., 79 S. Ct. 948, Quoting, **Dimick v. Schiedt**, 293 U. S. 474, 486.

When Courts of Appeals have encroached upon the jury's function by rendering judgments or granting new trials in the face of contrary jury verdicts, this Court has reproved such action by granting certiorari, and reversing on that point alone. E. g., **Dick v. New York Life Ins. Co.**, 359 U. S. 437; **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525; **Swafford v. Atlantic Coast Line R. Co.**, 350 U. S. 807, a per curiam reversal; **Gibson v. Phillips Petroleum Co.**, 352 U. S. 874, a per curiam reversal. See also, Green, **Protection of Jury Trials Diversity Cases**, 35 Texas L. Rev. 768. As this Court stated in **Byrd v. Blue Ridge Cooperative**, supra, 356 U. S. at 537:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."

The Court of Appeals correctly stated the three legal theories upon which petitioner proceeded to trial, i. e., Musgrove's actual authority as a general agent, Musgrove's actual authority as a lesser agent with power to orally bind the respondent, and Musgrove's apparent or ostensible authority to orally bind the respondent. After stating these theories, the Court of Appeals held that ". . . . there was no substantial evidence that Musgrove had either actual or apparent authority to orally bind Continental Casualty Company" 266 F. 2d at 276. The Court of Appeals listed items of evidence upon which the jury relied in reaching its verdict and proceeded syste-

matically to discount this evidence by giving strained and speculative inferences and intendments to it. In short the Court of Appeals retried the case on the printed record and reached a different conclusion than the jury who had heard the testimony. It, therefore, substituted its determination of the factual questions for that of the jury and reversed the trial judge who had held the evidence sufficient to support the verdict of the jury.

By its action in this case, the Court of Appeals must have been convinced by respondent that some superlative proof is required in an action on an oral binder or oral contract of insurance. Such is not the case. **Liverpool & London & Globe Ins. Co. v. McCree**, 213 Ala. 534, 105 So. 901, 904. It is common business practice for life, health and accident, and fire insurance companies to insure by oral binders. This practice gives substantial benefits to both insurer and insured.[3] Since the insurance companies started the practice of binders, it is not fair to allow them to claim the advantages while rejecting the burdens.

Since it is undisputed that respondent never even attempted to execute a written agency contract with Musgrove, and since it is also undisputed that Musgrove was respondent's agent and attempted to insure Holmes by oral binder (R. 230), the single issue in this case was the authority of respondent's agent Musgrove in the absence of written contract to bind respondent.

We will briefly recite the evidence which supported each of petitioner's three theories of recovery.

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[3] For a thorough discussion on this subject, see "Binding Receipts," 60 Harv. Law Rev. 1164. For representative cases discussing the agent's authority to orally bind the company, see *Sun Ins. Office of London v. Mitchell*, 186 Ala. 420, 65 So. 143; *Bankers & Shippers Ins. Co. of N. Y. v. Blackwell*, 260 Ala. 463, 71 So. 2d 267; *Liberty Nat. v. Hamilton*, 237 F. 2d 235 (6 Cir.).

1. Actual Authority as a General Agent.

The law is clear that if Musgrove was a general agent of respondent, respondent would then have been bound by any contract of insurance made by such general agent. E. g., **Nat. Life & Accident Ins. Co. v. Claytor,** 254 Ala. 413, 48 So. 2d 180; **American Life Ins. Co. v. Carlton,** 236 Ala. 609, 184 So. 171.

We will outline the evidence which abundantly supported the conclusion that Musgrove was Continental's general agent.

A. In his original application on February 3, 1956, for a $50,000 passenger aviation accident coverage Holmes was covered by Continental "on oral binder" (R. 184) from February 17, 1956, until the policy was issued in mid-May, 1956—a period of three months. Continental orally communicated to Musgrove that Holmes was covered by oral binder. Musgrove orally communicated this fact to Holmes with the authority and approval of Continental. Continental issued its oral binder on the passenger insurance six days before Musgrove was provided with Continental's application forms and more than ten days before the executed forms were returned to Continental (R. 42).

B. In Holland's telephone calls to Musgrove in March or April of 1956, Holland requested permission to license Musgrove as an agent of Continental for the State of Alabama, which permission was given. In this conversation Holland told Musgrove he was to write "the highest limit" of coverage, would do business directly with the Atlanta branch office of Continental, and would receive a "full agency commission" (R. 202).

C. In the same conversation Holland told Musgrove that he wanted Musgrove to handle Continental's busi-

ness like all his other business (R. 203). Respondent was aware that Musgrove was general agent for other insurance companies. See respondent's answer to interrogatory No. 16 (R. 274).

D. Holland told Musgrove in the same telephone conversation that Musgrove would be its "full agent for the aviation accident division, special risk, department" (R. 202).

E. In Holland's letter to Cadenhead on April 30, 1956, Holland stated that Musgrove's license "would permit the signatures on the above two policies to stand" (R. 579).

F. In Holland's letter to Cadenhead on May 7, 1956, he stated: "Please be assured that we intend in all ways to honor your Continental licensing, and we want to do as much business with you as possible and help you in all ways. As you doubtless know, the Continental Casualty Company issues more policies for more different types of risks than any other company, and in the Accident and Health business of stock companies, the Continental Casualty Company is larger than the rest combined . . ." (R. 208, emphasis added).

G. Musgrove's license from the Superintendent of Insurance of the State of Alabama listed him as an agent of Continental with Power 4; "Miscellaneous casualty, including official surety bonds". This was the highest power indicated on the form (R. 98, Pl's Ex. 5). Even though Power No. 12—"Soliciting Agent"—was not checked, respondent contended that Musgrove was at most a soliciting agent.

H. In Holland's request to Continental's general office in Chicago to license Musgrove as its Alabama agent, Musgrove was listed as an "agent" licensed to sell "accident & health" insurance who would

"report business through" the "Musgrove Insurance Agency" as the "**General Agent or Agency**" (R. 486, Pl.'s Ex. 13, emphasis added).

I. Musgrove had no superior in the State of Alabama (R. 121, 122).

J. Holland admitted that Musgrove had authority to issue Continental's individual trip accident policies without prior approval of Continental (R. 276, respondent's answer to interrogatory No. 16-b).

K. Holland testified that Continental policies issued in Alabama would not be valid unless countersigned by Musgrove (R. 601).

L. On February 25, 1957, four days after Holmes' death, Cadenhead told Holland that Musgrove had assured Holmes that he was insured as a pilot. Holland's silence and failure to deny Musgrove's authority at this time was much more than an inference that Musgrove was a general agent possessed of the power to orally bind Holmes (R. 661, 664).

Together, these items constitute much more than substantial evidence, they approach a "great preponderance" of the evidence that Musgrove was a general agent of Continental. In the absence of a written agency contract, how could the evidence of general agency have been any stronger than that presented by petitioner? We respectfully submit that the evidence briefly detailed herein shows that there were many "written or oral words or other conduct of Continental Casualty Company which, reasonably interpreted, caused Musgrove to believe that Continental desired him to act on Continental's account as a general agent" 266 F. 2d at 281.

However, the Court of Appeals, instead of applying its earlier stated "substantial evidence" test, listed many of

the above items of evidence and then proceeded to reweigh and discount this evidence in an attempt to show that it was not "substantial." For instance consider the Court of Appeals' treatment of Plaintiff's Exhibit No. 13 which was obtained by discovery. This document was Holland's request to Continental's General Office for Musgrove's license as as Alabama agent and it stated in par. 8 that the "applicant will report business through" the "Musgrove Insurance Agency" as the **"General Agent or Agency."** (Emphasis added.) In refusing to give any probative value to this admission of general agency by respondent, the Court stated:

> "Holland testified unequivocally that the information under paragraph 8 was for the sole purpose of identifying any business produced by Musgrove as belonging to the Atlanta Branch Office . . . the only manifest purpose of the instrument was a request to license an agent" 366 F. 2d at 279-280.

Respectfully, this treatment is beyond our comprehension. Here, the Court is making evidence disappear. By some new judicial alchemy, the Court is saying what was evidence is not evidence any more. The Court says that because of Holland's "unequivocal" testimony, the characterization of Musgrove as a "General Agent" is not substantial evidence. The sole purpose of Holland's testimony was to impeach and explain away the writings on the instrument. The jury, not the appellate court, heard Holland testify—the jury and not the Court of Appeals is properly the judge of his credibility. By such a review the Court of Appeals is not applying the federal test of substantial evidence, it is applying a new and unlimited appellate technique for taking a case from the jury. Since Musgrove considered himself a general agent of Continental, the explosive effect of Plaintiff's Exhibit No. 13 was to show that **Continental too had considered Mus-**

grove as a general agent. Because the Court of Appeals considered the conflicting evidence of Holland "unequivocal" on a reading of the cold record does not erase the written admission from evidence, nor is it usual that an admission to constitute evidence, be made with any "manifest purpose" to be used in evidence by the other side.

After discussing the telephone conversation in which Holland commissioned Musgrove as a "full agent . . . to secure business" and to write "the highest limit" of coverage with a "full agency" commission (R. 202), the Court stated:

> "The term 'full agent' can only be reasonably construed as bringing into existence the status of principal and agent . . . ," 266 F. 2d at 278.

In other words by ignoring or striking the word "full." The Court has done the same thing by "reasonable construction" as judicially deciding that the witness did not say "full agent," or "construing" the words "general agent" by striking the word "general." Open that door and leave it open and jury trial is a dead ritual with its heart cut out on the altar of "judicial construction." We could not suggest an expression more amply entitling the jury to find that Holland gave Musgrove full authority than the expression used by Holland to describe that agency.

After discussing Musgrove's agency license from the State of Alabama conferring on him the highest power provided on the form, "Power 4—Miscellaneous Casualty, Including Official Bonds," the Court concluded:

> "Summarily, this certificate 'is only evidence of the agency in some form.'" (Citing cases.) 266 F. 2d 278.

But the Court did not mention the failure of respondent to check Power 12 on the license form, which was that

of "soliciting agent". Since respondent contended throughout this litigation that Musgrove was no more than a "soliciting agent," it is "mildly" inconsistent that on the form licensing Musgrove as its Alabama agent, it did not check Power 12—this precise designation—but selected the broadest designation possible.

After discussing Musgrove's undisputed authority to issue, by oral binder or otherwise, individual trip accident policies, the Court stated:

> "Even had Musgrove received and made out these policies, it would not be evidence of general agency. These policies required no formal underwriting and would not, of course, have covered flying as a pilot or crew member." 266 F. 2d at 280.

But why would not the power to issue these trip policies be "substantial" evidence of the power to issue policies covering pilot or crew members? The fact is both these policies covered insureds **while flying**. Other policies, such as the one in question, covered pilots or crew members **while flying**. The court is saying that Musgrove was a general agent for one type of flying while a limited agent for another. This is similar to saying that evidence showing that one had power as a general agent to insure traveling salesmen is not substantial or probative in order to show power to insure local salesmen. The Court cites no authority for its distinction between the power to issue one type of policy and another. Perhaps the fact that Musgrove had the undisputed power to issue certain types of insurance does not compel the conclusion that he had the authority to issue the policy in suit. But in the absence of any limitation on his authority, it is certainly a reasonable conclusion. Continental never articulated the distinction made by the Court of Appeals to Musgrove or anyone else so far as this record shows until after Holmes' death.

After the court discussed the fact that Holmes was under oral binder for about three months with Continental without his application ever having been processed, the Court summarily stated:

> "The Company accepted the risk here. Further, Musgrove was not an agent of Continental Casualty Company on February 17, 1956." 266 F. 2d at 280.

We fail to understand the Court's logic in the quoted statement. First, certainly "the company accepted the risk here"—But it did it by oral binder—and it communicated the information relative to this oral binder by and through Musgrove.

Second, there was nothing significant about the date February 17, 1956. This was simply the date to which Continental made the Holmes' insurance coverage retroactive. Continental actually accepted the risk of February 23, 1956, which was the date that Musgrove was appointed an agent of Continental. Musgrove did every act of an agent relative to this insurance from solicitation to collection and transmittal of the premiums to Continental. The fact that his appointment was on the date Continental accepted the risk rather than the date it selected for premium purposes seems irrelevant.

Continental failed to have a written contract of agency with Musgrove. It designated Musgrove "a general agent" on its interoffice memorandum which petitioner obtained by discovery. On the licensing form provided by the State of Alabama, Continental checked the broadest power possible for Musgrove and omitted to check Power 12, "soliciting agent". It referred to Musgrove as a "full agent". It advised Musgrove that it wanted him to handle Continental's business like all his other business, knowing that Musgrove was a general agent for other insurance companies. Its agent believed that he had the powers of a general agent and so acted. But

the Court of Appeals stated that the totality of these facts coupled with the other evidence herein discussed was insufficient to permit it to allow the verdict of the jury and the judgment of the trial court to stand.

In the absence of a written contract, we fail to see how evidence could be stronger to support general agency in a disputed case. No evidence is strong enough by any rule, state or federal, to uphold a jury verdict, if the appellate court can set out the evidence and then in the name of "reasonable construction" or considering its "manifest purpose", denaturalize it as evidence and disregard it. The Court of Appeals has used an approach to the sufficiency of the evidence test that would forever free appellate courts from "unwise or unwanted" jury verdicts. "The curtailment of the right to a jury trial" manifest in this case requires the attention of this Court.

2. Actual Authority as An Agent Below a General Agent.

As the Court of Appeals stated: "an agent . . . may also be less than a general agent (such as a soliciting agent) and have actual authority to bind the company by oral binders or contracts in certain types of insurance." 266 F. 2d at 277-278.

But the court in applying its strange standard of review, brushed aside the possibility that Musgrove could be less than a general agent (as understood in insurance law) and still have actual authority to issue oral binders or contracts on the type of insurance in question.

We will not burden this Court with a detailed discussion of the evidence that supported Musgrove's actual authority. Most of this evidence has been itemized in the section of this brief discussing Musgrove's general agency.

A reference to this itemized evidence at pages 18 through 20 will demonstrate that there was substantial evidence to support petitioner's theory of actual authority.

3. Apparent or Ostensible Authority.

Again we quote the Court of Appeals statement of law that "it is elementary that, before a principal may be bound by its agent's apparent or ostensible authority, the person dealing with the agent must have relied on the appearances in some way to his detriment." 266 F. 2d at 282. But we cannot comprehend the Court's conclusion based on this statement that:

> ". . . in the case at bar, there was clearly no factual basis for the trial court to submit to the jury the question of apparent or ostensible authority Musgrove, for the reason that there was no holding out by Continental Casualty Company of Musgrove as an agent authorized to make contracts of insurance." 266 F. 2d at 282.

Respondent more than held out to Holmes that Musgrove had apparent authority to issue oral binders. It was through Musgrove that Holmes was orally insured for flying as a passenger from February 17, 1956, until February 27, 1956, at which time Holmes filled out Continental's application and it was through Musgrove that Holmes was given oral coverage as a passenger from February 27, 1956, to mid-May, 1956. The only assurance of any coverage for Holmes during all of this period of three months was the oral assurance of Musgrove, which Continental authorized Musgrove to give. We can think of no stronger "holding out" to Holmes than this. And certainly Holmes relied to his detriment on this "holding out" since he flew as a pilot and met his death after Musgrove's assurance that he was covered as a pilot in the same way that he had been covered as a passenger the

year before. It would have been unusual in the extreme for Holmes to challenge Musgrove's authority to orally bind him as a pilot, when, with Continental's approval, Musgrove had orally bound him as a passenger and had accepted Holmes' premiums during the full three months of the prior oral binder.

4. Denial of New Trial.

We earnestly submit that the evidence in this case is abundantly sufficient to meet either the state or "federal" test for sufficiency of the evidence. If we have failed to convince this Court of that fact, this case requires corrective action for yet another reason. The Court of Appeals deprived plaintiff of a jury trial by ordering judgment to be rendered for defendant instead of ordering a new trial.

The point here is not to dispute the general power in a proper case to reverse and render under Rule 50 (b), although it is contrary to the wise principles announced in Barrow and Hotzhoff, **Federal Practice and Procedure**, Vol. 2, pp. 777-8, derived from **Cone v. West Virginia Pulp & Paper Co.**, 67 S. Ct. 752, 330 U. S. 212, 67 S. Ct. 752, motion denied 67 S. Ct. 1090, 330 U. S. 813, motion denied 67 S. Ct. 1125, 331 U. S. 794.

The order in this case was based upon an egregious and manifest error of logic. Failure to correct it means irrevocable loss of petitioner's case upon a naked mistake in reasoning.

In oral argument this illustration was used: A plaintiff sues a railroad and the engineer in a case where only the engineer could have been negligent. In Alabama a verdict for the engineer is inconsistent with a verdict against the railroad. By false analogy, in its opinion, the Court of Appeals said:

> "The verdicts of the jury were in favor of the plaintiff, assessing her damages at $52,750.00 and in favor of third party defendants. **Necessarily** therefore, the jury found that the agents had actual authority." 266 F. 2d at 271-272.

But it does not follow that the jury did **not** find that Musgrove had apparent authority, also. And plaintiff was entitled to recover in full if Musgrove had apparent authority even if he did not have actual authority. Ala. Code, 1940, Title 9, §§ 68, 69, 73.

Yet the judgment of the Court of Appeals is founded on the complete fallacy that the verdict of the jury decided that Musgrove had **no** apparent authority because it found he had actual authority. A city clothes a man in a policeman's uniform but does not give him a commission. A jury finds he actually is a policeman. This does not say that he does **not** have a policeman's uniform. The jury found that Musgrove was a general agent **partly** because he did have apparent authority.

It is a cruel injustice for petitioner to lose her jury verdict and to be told that the verdict in her favor bars her forever from having her case tried before any jury.

The jury could and almost certainly did find that Musgrove had both actual and apparent authority. It absolutely did not find that he did not have apparent authority. If the verdict is inconsistent that is reason to set it aside, but no reason to enter a judgment for defendant and bar petitioner from submitting the question of Musgrove's apparent authority to a jury.

CONCLUSION.

The Court of Appeals has refused to apply the scintilla rule, in this diversity case, thereby depriving petitioner of the trial by jury to which she would have been assured in

the state court. This Court has recognized that the different Courts of Appeal are in conflict in answering the important question of whether a federal court in a diversity case should apply the state or a federal test of the sufficiency of the evidence. The holding of this Court of Appeals that it need not follow the state test is erroneous. The conflict in the circuits should be eliminated, and the injustice to petitioner should be corrected.

The Court of Appeals misapplied the federal test in holding that there was no substantial evidence to support the jury's verdict. It reached this erroneous conclusion by a novel technique that discounted petitioner's evidence and resolved all conflicting inferences in favor of respondent. The technique if approved makes meaningless the guarantee of the Seventh Amendment.

Petitioner was deprived of her rights under the Seventh Amendment in the instant case not only by the holding of the Court of Appeals that the evidence was too insubstantial to support the verdict, but by its further action of refusing to grant a new trial and ordering judgment entered for respondent.

For the foregoing reasons, petitioner prays that her petition for certiorari will be granted.

Respectfully submitted,

.....

FRANCIS HARE,

.....

TRUMAN HOBBS,

Counsel for Petitioner.

Certificate.

I hereby certify that a true copy of the foregoing brief has been served upon Messrs. Lange, Simpson, Robinson & Somerville, attorneys of record for respondent, Continental Casualty Company, and I further certify that a true copy thereof has been served upon Messrs. Mitchell & Poellnitz, attorneys of record for respondents, Musgrove Insurance Agency, a partnership composed of W. T. Musgrove and W. R. Cadenhead, and W. T. Musgrove and W. R. Cadenhead, individually.

This the ..... day of August, 1959.

.....

Truman M. Hobbs,
Of Counsel for Petitioner, Mrs. Gladys Leith Holmes.

APPENDIX A.

Tit. 9, § 68, Code of Alabama, 1940.

Agent's authority as to persons having notice of restrictions upon it.—Every agent has actually such authority as is defined by this title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restrictions upon his authority.

Tit. 9, § 69, Code of Alabama, 1940.

Agent's necessary authority.—An agent has authority: To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purposes of his agency; and, to make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made.

Tit. 9, § 73, Code of Alabama, 1940.

For acts done under a merely ostensible authority.—A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.

APPENDIX B.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 17,409.

Continental Casualty Company,
Appellant,
versus
Mrs. Gladys Leith Holmes et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

(April 16, 1959.)

Before Rives, Jones, and Wisdom, Circuit Judges.

Rives, Circuit Judge: Appellee, Mrs. Gladys Leith Holmes, as beneficiary, sued the appellant, Continental Casualty Company, for the proceeds of a purported accident and health insurance policy insuring her deceased husband, Oliver Wendell Holmes, while flying as a pilot. She claimed that coverage was in force as a result of an oral binder or oral contract of insurance effected by the Company's agent, W. T. Musgrove, on January 3, 1957, and again on February 20, 1957. Her suit was primarily based on the proposition that W. T. Musgrove, a partner with W. R. Cadenhead in the firm of Musgrove Insurance

Agency, had authority to orally bind the Company. Continental Casualty Company impleaded as third-party defendants the Musgrove Insurance Agency and the two partners individually (appellees here), alleging that none of the third-party defendants had actual authority to make the oral agreement and averred that, if Continental Casualty Company was liable to the plaintiff in this action (such liability being denied) on account of any apparent or ostensible authority, then the third-party defendants are in turn liable in the same amount to Continental Casualty Company.

The trial court submitted the questions to the jury with instructions that if they found the agents to have had either actual or apparent authority to orally bind the Company, the plaintiff would recover, and if they found the authority to be apparent only, then they should also find in favor of the Company in the same amount as against the agents.

The verdicts of the jury were in favor of the plaintiff, assessing her damages at $52,750 and in favor of the third-party defendants. Necessarily, therefore, the jury found that the agents had actual authority to make the alleged oral binder or contract.

Appellant-defendant contends vigorously that there was no substantial evidence justifying submission to the jury on the question of the agents' authority.

The deceased insured, Oliver Wendell Holmes, had prior to 1956 taken out several policies of various kinds of insurance, always using the Musgrove Insurance Agency of Florence, Alabama, to place his insurance. On February 8, 1956, Holmes executed an application for aviation accident insurance for coverage in the sum of $50,000, as a passenger in a certain aircraft, on a form provided by Queen Insurance Company, for which W. T. Musgrove

was agent. Musgrove forwarded this application together with a similar application of James Luther Culver to the Atlanta, Georgia, office of Queen Insurance Company, and this Company, already having considerable exposure under a policy covering the same aircraft, undertook to place this insurance with a friendly competitor, Continental Casualty Company. Mr. Herbert V. Holland, Jr., the representative of the Aviation-Travel Accident Division of the Atlanta branch office of Continental Casualty, was given the information of the two applicants by Queen, and Holland wrote a letter to Musgrove on February 23, 1956, confirming the rates and amount of coverage, enclosing application to be completed and stated that Holmes and Culver both had coverage effective February 17, 1956. This letter appears in the margin.[1] The application was executed by Holmes on February 27, 1956, and forwarded with a letter from Musgrove to Holland on February 29, 1956. The policies were issued and returned to Musgrove.

Upon discovery that these policies did not contain a countersignature by a licensed resident agent of Alabama, Holland telephoned W. R. Cadenhead, Musgrove's

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1 "Oliver Wendell Holmes &
James Luther Culver

"Dear Mr. Musgrove:

"We are holding on binder Aviation Accident coverage for the above-named gentlemen. This provides $50,000.00 Bodily Injury Death and Dismemberment insurance while riding as a passenger in scheduled, non-scheduled, and private aircraft which have Civil Aeronautics Board certification or the foreign equivalent. Each man has $50,000.00, effective February 17, 1956.

"I am writing to ask you to confirm the above and the annual rate per thousand dollars of $1.35. For ease in writing the policies, perhaps you can have the enclosed applications completed and return them to me with your reply. I know that you discussed with Jerry Smith of Royal the possibility of even broader aircraft. If this is desired, I will need to know to what use in what aircraft the men would put the insurance.

"In the meantime, they do have the coverage. Please let me hear from you as soon as possible."

partner, on March 9, requesting that the policies be returned to Atlanta for proper countersignature. There was delay in complying with this request, and on April 11, Holland wrote to Musgrove again requesting a return of the policies for proper countersignature. Upon further delay, Holland wrote Cadenhead on April 30 suggesting that Musgrove be licensed as an agent in Alabama which would allow Musgrove's countersignature to stand. Cadenhead answered on May 3 and gave Holland the necessary information to have Musgrove licensed. Thereafter, on May 7, Holland wrote Cadenhead a general business letter discussing the licensing of Musgrove and the countersignature of the two policies in question. In this letter he attempted to solicit business from the Musgrove Insurance Agency. This letter appears in the margin.[2] Hol-

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[2] "James Luther Culver
AA-108706

Oliver Wendell Holmes
AA-108707

"Dear Mr. Cadenhead:

"Thank you very much for your letter giving me the information we needed to apply for a Continental license for Mr. W. T. Musgrove. Mr. Musgrove's license has been ordered via our License Department in the Chicago Home Office, and it is my understanding that he should have it in his hands within two weeks.

"I am enclosing the two new policies for the above, which you sent to me. Will you please hold these in your office until Mr. Musgrove's license is received? After that it will be alright (sic) to deliver them to the insureds.

"You have been very kind and patient with us in this matter, and I sincerely appreciate your cooperation. Please be assured that we intend in all ways to honor your Continental licensing, and we want to do as much business with you as possible and help you in all ways. As you doubtless know, the Continental Casualty Company issues more policies for more different types of risks than any other company, and in the Accident and Health business of stock companies, the Continental Casualty Company is larger than the rest, combined.

"This means that we have the equipment, and we certainly hope we have the service to give you what you need. We have many attractive individual and group plans for all kinds of Sickness and Accident insurance. My personal division, Aviation, encompasses

land then had the license request cleared through Continental Casualty's Agents' License Department in Chicago.[3] Musgrove was licensed by the Insurance Department of the State of Alabama on May 24 and this agent's license was forwarded to Musgrove on May 28, 1956.

Musgrove testified that he had a telephone conversation with Holland in February or March of 1956, during which Holland asked permission to apply for a resident agent's license for Musgrove and Musgrove gave the permission. Musgrove stated that they discussed the type of agency and the commission to be paid. Musgrove testified:

> "Q. In that same conversation did Mr. Holland make any statement to you with respect to what kind of an agent he wanted you to be, and that Continental Casualty Company wanted you to be, Mr. Musgrove?
>
> ". . . .
>
> "The Court: What were the exact words he told you?
>
> "The Witness: To be a full agent for the aviation accident division, special risk, department of the Continental Casualty Insurance Company to secure business in Florence, Alabama, and my territory for his company.
>
> ". . . .

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all kinds of specialties and travel risks, and I am always on call to assist.

"You will be hearing from me from time to time in fairly routine ways when I add your name to our special mailing list, and I hope that I shall be hearing from you regularly, too.

"Sincerely yours,

Herb Holland,
"Herbert V. Holland, Jr.,
Aviation—Travel Accident Division."

[3] For this license request, see footnote 14, infra.

"Q. Now during that same telephone conversation, did you and Mr. Holland have a discussion about how much business potentially there was in the North Alabama area?

"A. Yes, sir.

"Q. Did you and Mr. Holland in this conversation discuss anything about what sort of limits that they wanted to write, or wanted you to sell for the Continental Casualty Company in regard to aviation accident policies?

"A. Nothing more than they were the largest writer, and the highest limit, wrote big limits, and wanted it.

"Q. Did Mr. Holland during that telephone conversation make any statement to you in regard to what sort of limits on a policy that you could sell for the Continental Casualty Company, Mr. Musgrove?

"A. No, sir.

"Q. Did Mr. Holland at that time give you any information or advice about to whom and with whom you would do business with the Continental Casualty Company?

"A. Through his department, Herbert V. Holland of the Continental Casualty Company.

"Q. Did he at that time tell you that you would be subordinate to any other resident agent or any other sort of agent for the Continental Casualty Company in the State of Alabama.

"A. No, sir.

"Q. Did you, Mr. Musgrove, have any conversation on that same occasion with Mr. Holland about how you would be paid for the business that you sold for the Continental Casualty Company or not?

"A. Yes.

"Q. Will you tell us what that was?

"A. Full agency commission and to be handled like all my other business, in my business."

After Musgrove received his resident agent's license from Holland on May 28, 1956, these parties had no further contact whatsoever until February 4, 1957.

On December 10, 1956, Musgrove wrote Holmes a letter concerning Holmes' policies in force at that time. Concerning the policy with Continental, this letter stated:

> "Aviation Accident Policy which should be rewritten since you are flying a plane by yourself; this is written on a passenger basis, and not as pilot, but you should have this changed to cover you as pilot of the plane, and I would appreciate your considering this and agreeing to change it. It will cost you more money but will give you the protection that is needed. This policy was charged to Pressure Concrete Company of Florence, and I think in all fairness, and I am sure you agree, that we should transfer this over to your account. Will appreciate very much your discussing this with me the next time we get together."

Musgrove then had a conversation with Holmes on January 3, 1957, and in that conversation Holmes stated he wanted aviation accident insurance on a pilot's coverage basis, and Musgrove told him that he was covered from then on. Musgrove made a notation reading, "Wendell Holmes Aviation Piolit (sic) . . ." and testified that he "went back to the office with it and turned it over to my partner, Billy Cadenhead, for processing and getting the policy endorsed or a new policy issued, whichever was necessary to be done." Musgrove told Cadenhead that Holmes was at that time insured by oral binder. The next day, January 4, Cadenhead wrote Continental Casualty Company, stating:

"Continental Casualty Company.

Re: AA 108707

Oliver Wendall (sic) Holmes

"Gentlemen:

"It is Mr. Holmes wishes to also have pilots coverage under this policy so will you please send us the necessary applications to have completed, or advise us what information you need. I am not sure what kind of plane he is flying, but will secure this for you if necessary."

Thereupon Holland answered Cadenhead on January 7 with the following letter:

"Oliver Wendell Holmes
AA-108707

"Dear Mr. Cadenhead:

"We will be delighted to entertain Mr. Holme's (sic) application for Pilot Coverage. I am enclosing another application which we would like to have him complete and also a Pilot History Form which also must be submitted.

"Depending upon Mr. Holmes experience and needs of the insurance, it is possible that our underwriters would not like to write as much as $50,000 principal sum for piloting. Completion of these two forms will help to determine this. If he should need only $25,000 while piloting, or that is all that could be written, we would be able to reduce the principal sum under the present policy to $25,000. All the present coverage is included in the Pilot Policy, so that he would have $50,000 just as he now has with $25,000 piloting. Of course, this is all problematical.

"Please let me know if I may be of further help."

Some six weeks later, on the night of February 20, 1957, Holmes brought the application and pilot's history form to Musgrove's office. The application had been partially filled out by Cadenhead. In the application was the question, "Do you understand and agree that no insurance will be effective until the policy is issued," and Cadenhead had inserted "yes." Concerning this answer Musgrove testified as to the conversation between him and Holmes:

> "The Witness: . . . I mean he went over these, read, he said, 'Look there, right there,' and I told him—and then is when he questioned me. He said, 'Haven't I been covered since you bound me back there?'
>
> "And I said, 'You have been covered for pilot's coverage.' And he said, 'Well, I have been flying just about every day.' And he said, 'What's this over here?' And I said that the 'Yes' right there wouldn't make any difference, because he was under binder, and it was just a mere formality of getting the document or the policy to him.
>
> "I did not know whether the Continental Casualty Company would indorse it. If they indorsed it they didn't need this application; if they wanted to rewrite a new policy, then they would take this application and rewrite a new policy and this would become a part of the policy.
>
> "And after that Mr. Holmes was satisfied with that, and I reaffirming to him at that time that 'you are covered flying as a pilot.'
>
> "The Court: Is that what you stated to him?
>
> "The Witness: Yes, sir.
>
> "Mr. Cox: All right, now.
>
> "The Court: Did he sign the application or had it already been signed?
>
> "The Witness: No, sir, he signed it that night."

The next day, February 21, Oliver Wendell Holmes was killed while flying as a pilot, and on this date Musgrove had the application forms on his desk.

Cadenhead took the application and pilot's history form to Atlanta on February 25 and there met with Holland. Holland testified that during that meeting and also during a telephone conversation that day with Musgrove while Cadenhead was in Holland's office, neither Cadenhead nor Musgrove made any reference to or discussed the oral binding of insurance as to Holmes. However, Cadenhead testified that he told Holland on this occasion that Musgrove had told Holmes that he was covered and that Holland did not then deny that Musgrove had the authority to bind Holmes.

About a week later, on March 4, Holland made an office memorandum concerning the above meeting and discussing the method of placing pilot coverage. This memorandum is printed in the margin.[4] It had penciled in at the bottom

[4] "Memorandum

"To: File March 4, 1957

"Oliver Wendell Holmes
AA-108708

"Monday, February 25, 1957, Mr. William R. Cadenhead of the Musgrove Insurance Agency, Florence, Alabama, came to see me asking if I had read in the papers that the above policyholder had been killed in an air crash. I was not aware of the tragedy. But I did know about Mr. Holmes' interest in extending his Aviation Division passenger accident policy to include piloting of certificated aircraft.

"Mr. Cadenhead and his employer, Mr. W. T. (Birney) Musgrove, were not approaching us with demands, just to ask advice.

"Here is the chronology of the situation:

"AA-108 policy was issued in early 1956 providing passenger coverage in airworthiness aircraft, our AA-3 program.

"On January 4, 1957, Bill Cadenhead wrote a short letter asking about endorsing the policy to include piloting for Mr. Holmes. I answered that it probably would be difficult, but probably possible, to

thereof: "Activity toward greater Continental production in his agency is greater than ever."

Thereafter, upon a denial of coverage by Continental Casualty Company, this suit followed.

Plaintiff's theory of the case rests upon the authority of the agent to effect a policy of insurance by an oral binder or by an oral contract of insurance, concluding that if sufficient authority existed in the agent Musgrove to bind the Company, it is immaterial for plaintiff's recovery whether the authority be actual (express or implied) or apparent (ostensible). Plaintiff also proceeds on the collateral theory that Musgrove was a **general agent** for the Company, which position automatically gave him the power to orally bind the Company in various ways. In presenting this double-barreled approach, the plaintiff claims that Musgrove had authority whether he is found

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extend the $50,000 principal sum which he already had to include pilot. I said that Mr. Holmes would have to complete a new application and a Pilot History form.

"I heard nothing further until February 25, 1957. However, February 20, 1957, Mr. Musgrove obtained from Mr. Holmes a Pilot History form properly completed and a Special Risks Division tissue application which was to have accompanied the Pilot History form for Aviation Division underwriting. Of course, the application used asked the usual question, which was answered, about no insurance being effective until a policy could be issued.

"Mr. Cadenhead brought these two forms to my office on February 25 and we agreed that there was no binding for any part of $50,000 which Mr. Holmes was trying to place. I told Mr. Cadenhead that our limit for the 150 hours Mr. Holmes' Pilot History form showed is $10,000 and that while I could have bound on the information in the Pilot History form $10,000 pilot coverage I could not have gone higher. I told him that I would have answered these two forms if they had been presented to me for underwriting with an offer to help place the other $40,000 to $50,000 requirement with friendly competitor. I would have offered to bind the $10,000 we might have written if the agent had confirmed in some way.

"Mr. Cadenhead left satisfied.

"Herbert V. Holland, Jr."

to be a general agent or something less, such as a soliciting agent.

Appellant's first and second specifications of error rest upon the refusal of the trial court to grant a motion for a directed verdict made at the close of all the testimony and the refusal to grant a judgment notwithstanding the verdict. In reviewing the latter motion, as well as the first, we must determine if the record contains evidence of "probative facts capable of supporting, with reason," the verdict; for if it does, the verdict must stand.[5] Another similar test to review jury verdicts is that if there is **any substantial evidence** which supports the verdict it must stand.[6] "Substantial evidence" has been best defined by Chief Justice Hughes as follows: "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] With these premises in mind, we hold that appellant's first two specifications of error are well taken as there was no substantial evidence that Musgrove had either actual or apparent authority to orally bind Continental Casualty Company.

We state at the outset that the test to determine whether a general agency exists, in both Alabama case law and in

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[5] Myers v. Reading Co., 1947, 331 U. S. 477, 485. See also, Thomas v. Atlantic Coast Line Ry. Co., 5th Cir., 1955, 223 F. 2d 1, 4; Reuter v. Eastern Air Lines, 5th Cir., 1955, 226 F. 2d 443, 446.

[6] Aetna Life Ins. Co. v. Ward, 1891, 140 U. S. 76, 91; Lancaster v. Collins, 1885, 115 U. S. 222.

[7] Edison Co. v. Labor Board, 1938, 305 U. S. 197, 229. While this was an administrative case, the rule stated is applicable as well to jury verdicts.

[8] The general statements following in the body of the opinion are paraphrased from 16 *Appleman, Insurance Law & Practice*, § 8691, p. 401, and are correct statements of both general insurance law and Alabama case law. This section states in part:

> "A great deal of confusion has arisen in the law of principal and agent, in so far as insurance contracts are concerned, by

general insurance law, is whether the agent "has the power to bind the insurer by his contract of insurance, or to issue

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the loose terminology employed by many courts. Often, in their desire to find a waiver or estoppel, they have used a double-edged reasoning, stating that because an agent does this and so, he is a general agent, and because he is a general agent, he can do many other things in addition thereto. It is true, as will be shown later, that a general agent can bind the insurer in many ways which a soliciting agent cannot. It is important, however, to find a precise and exact test which will be susceptible of easy application. That test is whether or not the agent has the power to bind the insurer by his contracts of insurance, or to issue policies on his own initiative, or to accept risks, and if the agent has actual authority to do these things, he is a general agent; if he cannot place coverage in effect, but can merely initiate negotiations therefor, he is not a general agent."

[Thus far, we agree wholly with Appleman's text. However, in the following portion, we express some doubt as to the pragmatic statements that a general agent can be created only by actual authority. It seems to us, where the third person relies to his detriment upon the apparent or ostensible authority of an agent and this authority is that normally of a general agent, the agent is, for that transaction, a general agent in the the normal sense of that term and the insurer may be bound through the doctrine of ratification, estoppel, or waiver. However, these distinctions may be based more on legal gymnastics or on semantics than on disagreement of legal principles.]

"It is important not to reason backward in applying such a test. Thus, to take a soliciting agent who can merely solicit applications, deliver policies, or do other acts, and say brashly that he was apparently vested with ostensible authority to bind the insurer by his contract, that the insured was justified in relying thereon, that the agent was, therefore, a general agent, and because of that had the power to bind the insurer by his contracts, is a mere circumlocution of logic which would permit the court in any case desired to find a general agency. A general agency cannot be based upon implied, apparent, or ostensible authority. There must be actual authority to bind the insurer by the issuance of a policy or the completion of a contract. If such actual authority exists, the other powers of a general agent necessarily co-exist upon which the insurer can be bound in other ways. If such actual authority does not exist, the agent is not a general agent, regardless of his ostensible powers, and the insurer could be bound by his contracts of insurance only through the doctrines of waiver, estoppel, or ratification. If this distinction and

policies on his own initiative, or to accept risks, and if the agent has actual authority to do these things he is a general agent";[8] he may then bind the company in other ways, such as by oral contract, by waiving certain policy or application provisions and the like.[10] The general agent whose authority is limited in some way or an agent who is, by certain limitations, less than a general agent may also bind his principal in the above ways as though he were a general agent by apparent or ostensible authority through the doctrines of waiver, estoppel, or ratification, and, of course, the injured party must have relied upon his apparent authority in some way to his detriment.[11] He may also

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definition is borne in mind, and the few decisions which are squarely erroneous are dropped into limbo, little difficulty can arise."

[9] *Ibid.* The test to determine general agency in Alabama law is the same. See Liberty Nat. Life Ins. Co. v. Stagg, 1942, 242 Ala. 363, 6 So. 2d 432; United Burial & Ins. Co. v. Collier, 1931, Ala. App., 130 So. 104, cert. den., 130 So. 106; Robinson v. Aetna Ins. Co., 1901, 30 So. 665, 128 Ala. 477. See, also, Piedmont Fire Ins. Co. v. Pierce, 1944, 245 Ala. 415, 17 So. 2d 133, 136, and Bankers & Shippers Ins. Co. of New York v. Blackwell, 1954, 260 Ala. 463, 71 So. 2d 267.

[10] 16 Appleman, *op. cit. supra.* *E. g.*, See Simpson Sales Co. v. British Gen. Ins. Co., 1952, 257 Ala. 289, 58 So. 2d 591, where a territorial limitation upon the authority of a *general agent* does not bind an insured who has no notice of the agency limitation and deals with the agent to his harm; Piedmont Fire Ins. Co. v. Pierce, 1944, 245 Ala. 415, 17 So. 2d 133, where general agent of fire insurance company waived policy provisions; United Burial & Ins. Co. v. Collier, note 9, *supra*, where a general agent could bind the company by an oral contract to insure; United States Life Ins. Co. v. Lesser, 1900, 126 Ala. 568, 28 So. 646, where a soliciting agent's authority was extended by parol to that of a general agent and he then waived a provision of the policy regarding payment of premium.

[11] 16 Appleman, *op. cit. supra*; United Burial & Ins. Co. v. Collier, note 9, *supra*; Fidelity-Phoenix Fire Ins. Co. v. Ray, 1946, 246 Ala. 425, 72 So. 98; Ray v. Fidelity-Phoenix Fire Ins. Co., 1914, 187 Ala. 91, 65 So. 530; Robinson v. Aetna Ins. Co., 1901, 128 Ala. 477, 30 So. 665; National Life Ins. Co. v. Reely, 1928, 217 Ala. 114, 115 So. 8; Liberty Nat. Life Ins. Co. v. Stagg, 1942, 242 Ala. 363, 6 So. 2d 432, 433.

be less than a general agent (such as a soliciting agent) and have actual authority to bind the company by oral binders or contracts in certain types of insurance.[12]

I. Actual Authority.

(a) General Agent.

Therefore, if Musgrove had the power to bind the Company "by his contracts of insurance, or to issue policies on his own initiative, or to accept risks," or if the Company designated Musgrove to be a general agent by some action or manifestation, then he would be a general agent with the power to bind the Company in the manner claimed by Mrs. Holmes. It is elementary that **actual authority** can only be created "by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him to act on the principal's account."[13]

---

[12] 16 Appleman, *op. cit. supra.* The typical examples are fire insurance agents. See Tutton v. Liverpool & London & Globe Ins. Co., 1939, 237 Ala. 230, 186 So. 551, 556; Sun Ins. Office of London v. Mitchell, 1914, 186 Ala. 420, 65 So. 143, 145. For a distinction between agents of fire and life insurance companies, see American Life Ins. Co. of Alabama v. Aladdin Temple Ben. Ass'n, 1939, 238 Ala. 512, 191 So. 903, 906. See also Bankers & Shippers Ins. Co. of New York v. Blackwell, 1954, 260 Ala. 463, 71 So. 2d 267.

[13] This basic rule is succinctly stated in Section 26, Restatement of Agency, Second:

§ 26. *Creation of Authority: General Rule.*

"Except for the execution of instruments under seal or for the performance of transactions required by statute to be authorized in a particular way, authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account."

The facts which Mrs. Holmes vigorously insists establish by substantial evidence that Musgrove had authority as a general agent are discussed as follows:

First, Musgrove's testimony as to a telephone conversation in February or March of 1956 where Holland assured Musgrove that he would be a "full agent . . . to secure business", and would receive a "full agency commission," as quoted supra. This is appellee's strongest evidence. However, this conversation took place prior to the issuance to Musgrove of a license by the State Department of Insurance at a time when Musgrove was not an agent of the Company. The term "full agent" can only be reasonably construed as bringing into existence the status of principal and agent or employer and employee, not as conferring general agency powers upon Musgrove.

Second, the agent's certificate or license from the Superintendent of Insurance of the State of Alabama, authorizing Musgrove to act with the powers listed as "Miscellaneous Casualty, including Official Surety Bonds." Summarily, this certificate "is only evidence of the existence of the agency in some form." **American Life Ins. Co. of Alabama v. Carlton**, 1942, 242 Ala. 661, 8 So. 2d 166, 169. See also **Liberty Nat. Life Ins. Co. v. Staggs**, 1942, 242 Ala. 363, 6 So. 2d 432, 433; **American Life Ins. Co. of Alabama v. Aladdin Temple Ben. Ass'n**, 1939, 238 Ala. 512, 191 So. 903.

Third, Plaintiff's Exhibit No. 13, which was a request from the Atlanta branch office to the General Office in Chicago of Continental Casualty Company to license Musgrove as an individual resident agent. Appellee places great emphasis upon paragraph 8 of this request. Paragraph 8 entitled "Applicant will report business through" is answered "Atlanta" as the branch office and "Musgrove Insurance Agency" as the General Agency or Agency. The

pertinent portions of this application are reported in the margin.[14] Holland testified unequivocally that the informa-

---

[14]

"Date May 4, 1956

"1. Applicant

"Name Musgrove, William Thomas
(Last) (First) (Middle)

"3. Request (Check appropriate box in each column.)

[XX]	License	[XX]	Individual
[ ]	Appointment	[ ]	Corporation
		[ ]	Partnership
[XX]	Agent		
[ ]	Broker	[XX]	Resident
[ ]	Special Representative	[ ]	Non-Resident

"5. State in Which Applicant Is to Be Licensed
Alabama

"6. Lines or Authority of License to Be Issued
(Specify each line of insurance requested.)
Accident and Health

"7. License Status of Applicant (Check all applicable answers. Supply necessary information.)

Applicant: (Complete blanks directly below. Form will be returned if not answered fully.)

[XX] Already licensed in state specified in item 5 by reason of an appointment by another Company.

[ ] Already licensed in state specified in item 5 by direct issuance of a license by the Insurance Department.

Agent	Accident & Health
Applicant licensed as: Agent, Broker, etc.	Licensed to sell what kinds of insurance?
No Number 12 31 1955	Accident & Health
License No. Date license issued?	Licensed with what kind of Company?

tion under paragraph 8 was for the sole purpose of identifying any business produced by Musgrove as belonging to the Atlanta Branch Office, and this request never went out of the offices of the Company and was not known to Musgrove until after this litigation was commenced and was never known to Holmes. However, even had Musgrove known of this instrument, the only manifest purpose of the instrument was a request to license an agent. We agree with appellant that it is without reason to interpret Plaintiff's Exhibit No. 13 as affording the basis of a finding that Musgrove was a general agent of the Company.

Fourth, Musgrove's authority to issue trip accident policies. While Holland testified that Musgrove had authority to issue these individual trip accident policies, the record indicates that he never issued one and did not receive any policy blanks until after February 27, 1957, the date on

"8. Applicant Will Report Business Through
(Complete Home Office and General Agent or Agency
Or Branch and General Agent or Agency)

: Answer fully. This information essential to both the recording and renewal of licenses. Form will be returned if incomplete.

Home Office
Name of Division — Division

Atlanta — Branch Office
Name of Branch

Musgrove Insurance Agency — General Agent or Agency
Name of Agent or Agency

First Nat'l Bank Bldg., Florence, Alabama
General Agent or Agency Address"

which a book of "YBT Travel-Accident Policies" was sent to Musgrove. Even had Musgrove received and made out these policies, it would not be evidence of general agency. These policies required no formal underwriting and would not, of course, have covered flying as a pilot or crew member. We agree with appellant that there is no substantial difference between this type of policy and the policies which can be procured from vending machines in all major airports. This type policy is characterized by the necessity of immediate issuance, and the basic differences between it and a Health and Accident Policy on a pilot for $50,000 for a year are so obvious as to warrant no further discussion.[15]

Fifth, certain correspondence which passed between Holland and Musgrove or Cadenhead. This correspondence has already been set out in this opinion. For instance, see Holland's letter of February 23, 1956, Holland's letter of May 7, 1956, Cadenhead's letter of January 4, 1957, Holland's letter of January 7, 1957, Holland's memorandum of March 4, 1957. Appellee insists that these items of correspondence, either individually or collectively, are substantive evidence of Musgrove's authority as a general agent. Again we do not agree. A careful reading of the letters in the light most favorable to appellee indicates that they have no probative value in ascertaining or indicating Musgrove's authority to act as a general agent, but rather these letters indicate a limited agency.

Sixth, the fact that Holmes was given life insurance as a passenger effected by oral binder from 17th February until the middle of May, 1956. Appellee in brief and in the court below insists that **Musgrove** orally bound the Company for this time and such fact is strong evidence

[15] These trip accident policies can perhaps be compared with certain fire policies where a soliciting agent has authority to bind the company orally or otherwise. See n. 12, *supra*.

of his authority to orally bind the Company on the contract in question. However, the record clearly shows that Holland and not Musgrove bound the coverage as to Holmes and Culver on February 17, 1956, after obtaining the necessary information from Queen Insurance Company and that this was confirmed to Musgrove by letter on February 23, 1956, which also contained the applications. The Company accepted the risk here. Further, Musgrove was not an agent of Continental Casualty Company on February 17, 1956.

Other pertinent facts, which are undisputed, showing the relationship between Musgrove and Continental Casualty Company are briefly as follows. During the period from February 17, 1956, through February 20, 1957, Musgrove or his agency did not have in possession any blank policies providing for aviation accident insurance or blank applications of Continental Casualty Company relating to such insurance, except the two original applications signed by Holmes and Culver and the second application signed by Holmes on February 20, 1957; and during this time, Musgrove handled no insurance business for Continental except those applications above. Holland, who was the only representative of Continental with whom Musgrove dealt, did not have authority from Continental to extend to an agent authority to bind normal aviation accident insurance (except trip policies) and did not have authority to authorize an agent to write policies covering flying as a pilot.

Musgrove did not receive any specific instructions from Holland concerning his agency and had no written agency contract with Continental other than the license issued by the Alabama Department of Insurance.

The undisputed evidence further showed that the underwriting in connection with applications for insurance

of the type involved in this case was done either in Atlanta or Chicago. And it was not the practice during 1956 and 1957 of **any** company writing accident and health insurance in Alabama to give oral binders.

There was also undisputed evidence to show that Musgrove knew that he did not have actual authority to accept risks and make contracts for Continental and therefore was not a general agent. This evidence is: First, the two applications for coverage of Holmes and Culver while flying as passengers (which were sent to Musgrove for the signature of Holmes and Culver after an oral binder had been effected by Holland on the basis of the applications to Queen Insurance Company) contained the same question as the later application for pilot coverage, which was "Do you understand and agree that no insurance will be effected until the policy is issued?" Second, the two original policies issued on the above applications which insured Holmes and Culver while flying as passengers had as a normal policy provision the following:

> "This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions."

Third, the application for pilot coverage signed by Holmes on February 20, 1957, stated: "12. Do you understand and agree that no insurance will be effected until the policy is issued?" This was answered, "Yes." Fourth, Musgrove had in his possession a pamphlet from Continental captioned "THIS IS MAX" and relating to policies covering passengers in certain specified aircraft. This pamphlet limited the authority of agents by providing:

"Binding—Regular MAX: No agent has authority to bind coverage. Policies are to be dated effective on the date the issuing office approves application. (See question #12 on app SRZ-1171-B.)"

We also place some emphasis on the fact that Cadenhead, in his letter to Holland of January 4, 1957, merely asked for application forms for pilot coverage and did not mention that Musgrove had orally bound the Company for $50,000, knowing that Musgrove had assured Holmes of coverage. Again, after receiving Holland's letter of January 7, 1957 (which stated, "We will be delighted to entertain Mr. Holland's application for Pilot Coverage" and expressed doubt as to a $50,000 pilot's coverage), Cadenhead did not advise Holland of Musgrove's oral binder of January 3.

We are of the opinion that all of the evidence in this case can only show that Musgrove was merely a "local" or "resident" agent, having the powers normally conferred on a "soliciting" agent with no actual authority to bind the Company by oral contract or binder, and that his actions in assuring Holmes of immediate coverage were clearly without the scope of his actual authority. There were no "written or spoken words or other conduct of Continental Casualty Company which, reasonably interpreted, caused Musgrove to believe that Continental desired him to act on Continental's account as a general agent."[16]

(b) Soliciting Agent.

Anticipating that the evidence might not meet the requirement of showing a general agency, appellee alternatively alleges that Musgrove's authority as a soliciting agent was broad enough to effect an oral binder of this sort, since

[16] Paraphrased from Restatement, Agency, Second, § 27, note 13, *supra*.

". . . almost all soliciting agents are now given the power of temporary binder to protect the insured while his application is being considered by the company for acceptance or rejection." 16 **Appleman, Insurance Law and Practice,** § 8691, p. 105.

This statement is taken out of context and refers to a fire insurance agent's power to issue ten-day binders which are "more or less automatic, and ministerial in their nature." An analogous power which Musgrove had was the issuance of the individual trip accident policies. However, neither of these even resemble the general agent's power of issuing policies, accepting risks, and other acts involving the "exercise of selection and discretion." 16 **Appleman,** *supra,* p. 105.[17]

II. Apparent Authority.

The countersuit below instituted against the Musgrove Insurance Agency and the two individuals as partners was based entirely on apparent authority of Musgrove to so act. Again, it is elementary that before a principal may be bound by its agent's apparent or ostensible authority, the person dealing with the agent must have relied on the appearances in some way to his detriment.[18]

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[17] See notes 12 and 15, *supra*.

[18] See cases in note 11, *supra*. Section 27, Restatement of Agency, Second, states:

"§ 27. *Creation of Apparent Authority: General Rule.*

"Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."

See, also, 16 *Appleman, supra,* § 8674.

We agree with the appellant that, "in the case at bar, there was clearly no factual basis for the trial court to submit to the jury the question of apparent or ostensible authority of Musgrove, for the reason that there was no holding out by Continental Casualty Company of Musgrove as an agent authorized to make contracts of insurance." See 2 C. J. S., Agency, § 96, pp. 1205-1206. While the evidence shows that the book of VBT travel-accident policies came into Musgrove's possession after Holmes' death, even if Holmes had known that Musgrove could have issued these trip policies (there was no evidence on this), the policies themselves would have put Holmes on notice that they did not cover a pilot or crew member or anything other than trip insurance. See, **Great American Casualty Co. v. Eichelberger,** 37 S. W. 2d 1050; **Hartline v. Mutual Benefit Health & Accident Ass'n,** 1938, 5th Cir., 96 F. 2d 174.

According to Musgrove's testimony, Holmes twice relied on Musgrove's assurance that he was covered by oral binder, once on January 3 and again on January 20, but this reliance cannot impose liability on the Company as there is a complete absence of actual or apparent authority.

The judgment is therefore reversed and the cause remanded with directions to enter judgment for the defendant. See 28 U. S. C. A., § 2106.

Reversed and Remanded With Directions.

A true copy.

Test:

Edward W. Wadsworth,
Clerk, U. S. Court of Appeals,
Fifth Circuit,

By Clara R. James,
Deputy.

New Orleans, Louisiana
Jun 24 1959

(Seal)

Judgment.

Extract from the Minutes of April 16, 1959.

Continental Casualty Company,
Appellant,

versus No. 17409

Mrs. Gladys Leith Holmes et al.,
Appellees.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the defendant;

It is further ordered and adjudged that the appellees, Mrs. Gladys Leith Holmes and Musgrove Insurance Agency, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 18 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 346.

MRS. GLADYS LEITH HOLMES,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY et al.,
Respondents.

BRIEF

Of Respondent, Continental Casualty Company in Opposition.

REID B. BARNES,
Exchange Security Bank Building,
Birmingham, Alabama,
Counsel for Respondent, Continental Casualty Company.

JAMES A. SIMPSON,
WILLIAM L. CLARK,
LANGE, SIMPSON, ROBINSON & SOMERVILLE,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

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MRS. GLADYS LEITH HOLMES,
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CONTINENTAL CASUALTY COMPANY et al.,
Respondents.

BRIEF

Of Respondent, Continental Casualty Company in Opposition.

OPINIONS BELOW.

There was no opinion of the District Court. The opinion of the Court of Appeals is reported in 266 F. 2d 269.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

(Restatement.)

QUESTION 1.

Was the Court of Appeals required to recognize the scintilla rule prevailing in the state courts of Alabama in considering the propriety of directing the District Court to enter a judgment in favor of the defendant, where the case involved substantive law of Alabama?

QUESTION 2.

Is the evidence in the case sufficient to support the verdict of the jury and does the Seventh Amendment of the Constitution forbid the Court of Appeals from re-examining the facts for the purpose of determining whether the District Court erred in refusing the motion for a directed verdict requested pursuant to Rule 50 (b)?

STATUTES INVOLVED.

Title 7, Section 277, Code of Alabama, 1940, is involved and provides that "No more than two new trials can be granted to the same party in any cause."

General Acts of Alabama, 1953, page 247, and Title 28, Section 66, Code of Alabama of 1940, are involved, and the provisions thereof are set out in Appendix A.

STATEMENT OF THE CASE.

The petitioner, a resident of Alabama, sued respondent in the United States District Court for the Northern District of Alabama, claiming (R. 2-5) that a policy of insurance issued by the respondent on or about February 17, 1956, insuring the petitioner's husband against loss

of life by riding as a passenger in an aeroplane, was, by oral contract or agreement of an agent of the respondent, acting within the line and scope of his employment, extended to cover the insured while flying as a pilot; that subsequent to such oral contract or agreement, the insured was killed while flying a private passenger aeroplane.

The respondent denied that the agent who negotiated with the deceased had authority to change or extend the written policy so as to effect, by oral contract or agreement, coverage as to a hazard not included in the policy, and which was specifically excluded therefrom.

The agent, W. T. Musgrove, and his partner, W. R. Cadenhead, were impleaded as third parties defendant on the theory that the agent exceeded his actual authority and would be liable to the respondent for any judgment obtained by the petitioner based upon a finding that the agent bound the respondent on account of apparent or ostensible authority.

The Court submitted to the jury as between the plaintiff (petitioner) and the defendant (respondent) the issues as to whether the agent negotiating with the insured had authority, either actual or apparent, to make the alleged oral agreement covering the insured while flying as a pilot and whether the insured was estopped or precluded from asserting that the agent had authority to make the alleged agreement. As to the issues between the third party plaintiff, Continental Casualty Company, and the third party defendants, the Court instructed the jury that if the jury should make a finding in favor of Mrs. Holmes, based upon apparent authority of the agent, and not upon actual authority of the agent to make the alleged oral agreement, then the jury should also find in favor of the third party plaintiff in the same amount as that awarded the plaintiff.

A photocopy of the policy involved in this case is contained in the record, pages 45-48, and the original (Plaintiff's Exhibit 1) was among the numerous exhibits transmitted to the Court of Appeals under order (R. 815-816) of the District Court. Mrs. Holmes was named as beneficiary in the policy, which was in a form complying with the provisions of General Acts of Alabama, 1953, page 247, including the following:

> "Entire Contract; Changes: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or waive any of its provisions."

The basic question involved in the trial of the case, and on the appeal, was whether the alleged oral agreement, said to have been made by Musgrove on January 3, 1957, and reaffirmed on February 20, 1957, was binding upon the defendant. Although the period from January 3, 1957 to February 21, 1957, is significant, it becomes necessary, in view of the questions hinging upon the authority, either actual or apparent, of the agent, for the Court to consider the circumstances, under which the policy was issued and the transactions between the Company and the agent, after the issuance of the policy, in order to gain a clear understanding of the facts which were considered by the Court of Appeals in reaching the conclusion that the defendant was entitled to have granted its motion for a directed verdict.

For a number of years prior to February 17, 1956, the effective date of the policy issued to Mr. Holmes, the deceased, W. T. Musgrove was engaged in an insurance

business conducted in Florence, Alabama, and he and Mr. Cadenhead were partners in the business during the period important to this litigation. They were agents of various insurance companies writing fire, casualty, life, accident and health insurance.

On February 3, 1956, Oliver Wendell Holmes executed an application for aviation accident insurance on a form provided by Queen Insurance Company of The Royal Liverpool Group (Defendant's Exhibit 1), for which W. T. Musgrove was acting as agent. This application, together with a similar application of James Luther Culver, was forwarded to the Atlanta, Georgia, office of The Royal Liverpool Group and there considered by its representative, Mr. Jerry Smith. In view of the fact that Queen Insurance Company already had considerable exposure under a policy covering the aircraft identified in the applications, Mr. Smith undertook to place the insurance applied for, or a portion thereof, with another company. Mr. Herbert V. Holland, Jr., a representative of Continental Casualty Company, assigned to the Aviation-Travel Accident Division of the Atlanta branch office, was contacted by Mr. Smith, who furnished Mr. Holland with the information contained in the applications of Mr. Holmes and Mr. Culver. After some further discussions between Mr. Holland and Mr. Smith, Mr. Holland wrote a letter to Mr. Musgrove under date of February 23, 1956 (Plaintiff's Exhibit 4), advising that Continental Casualty Company was holding on binder aviation accident coverage for Holmes and Culver. This letter (R. 42) recited that the two men named were covered in the sum of $50,000.00 "while riding as a passenger" in certain specified aircraft. The annual premium quoted was $1.35 per thousand.

With the letter of February 23, 1956 (set out in the margin of the opinion of the court below, 266 F. 2d at page 272), Mr. Holland forwarded to Mr. Musgrove appli-

cations on forms of Continental Casualty Company which were to be executed by Mr. Holmes and Mr. Culver. In this letter Mr. Holland called to Mr. Musgrove's attention that certain additional information, not called for by the form applications, would be needed if broader aircraft coverage was desired by the applicants.

The application of Mr. Holmes (Defendant's Exhibit 2) was executed on February 27, 1956, and forwarded to Mr. Holland with letter of Mr. Musgrove dated February 29, 1956 (Defendant's Exhibit 3). In this letter Mr. Musgrove advised that the coverage mentioned in Mr. Holland's letter of February 23, 1956 (that is, coverage while riding as a passenger) was broad enough (R. 470) to meet the wishes of Mr. Holmes.

Neither Mr. Holland nor Mr. Musgrove considered that the latter was an agent of Continental Casualty Company prior to the issuance of the policy, effective February 17, 1956, and Mr. Holland knew at the time he received Mr. Musgrove's letter of February 29, 1956, that, Mr. Musgrove was not a licensed agent of Continental Casualty Company (R. 473-475). When Mr. Holland discovered on March 9, 1956, that the policies applied for by Mr. Holmes and Mr. Culver had been forwarded directly to Mr. Musgrove by the Policy Writing Section of the Atlanta branch office, without countersignatures by a licensed resident agent, he phoned Mr. W. R. Cadenhead and subsequently wrote him requesting that the policies be returned to Atlanta (R. 478). There was some delay in returning the policies to Atlanta for proper countersignatures by a resident agent licensed by the State of Alabama and Mr. Holland suggested to Mr. Cadenhead that the problem be solved by Continental Casualty Company procuring an Alabama license for Mr. Musgrove. As will appear from the facts hereinafter set forth, no agency relationship between Musgrove and Continental Casualty Company would

have come into existence but for the problem arising in connection with the procuring of countersignatures by a licensed resident agent on the policies of Holmes and Culver.

Some of the negotiations leading to the issuance of an Alabama license to Mr. Musgrove are reflected in a letter from Holland to Musgrove, dated April 11, 1956 (Third Party Defendants' Exhibit 1), a letter from Musgrove Insurance Agency to Holland, dated May 3, 1956 (Defendant's Exhibit 18) and Holland's reply under date of May 7, 1956 (Third Party Defendants' Exhibit 2—appearing in the margin of the opinion, 266 F. 2d at page 272).

Plaintiff's Exhibit 13 reflects that an Alabama resident agent's license was requested and issued to William T. Musgrove in May, 1956. The form of the Certificate of Authority issued by the Department of Insurance—State of Alabama, is shown by Plaintiff's Exhibit 5.

The policies insuring Holmes and Culver, having been returned to Atlanta, pending the procurement of a license for Musgrove, were sent back to Musgrove Insurance Agency after the taking of all steps necessary to the issuance of a license.

No written agency contract was entered into between Musgrove or Cadenhead and Continental Casualty Company (R. 112). Musgrove Insurance Agency was placed upon the mailing list of the Aviation-Travel Accident Division of the Atlanta branch office of Continental Casualty Company and received from time to time certain bulletins and advertising material published by Continental Casualty Company. With the exception of such bulletins and advertising matter, there was no correspondence between Musgrove Insurance Agency and Continental Casualty Company after the license was procured for Musgrove and prior to January 4, 1957 (R. 146). Under date of January

4, 1957, Mr. Cadenhead wrote Continental Casualty Company a letter which is set out in the opinion of the Court of Appeals (266 F. 2d at page 274).

The next contact between Musgrove Insurance Agency and Mr. Holland was on Monday, February 25, 1957, on which date Mr. Cadenhead personally carried to Mr. Holland in the latter's Atlanta office an application (Defendant's Exhibit 6) and a Pilot History (Defendant's Exhibit 7), both of which purported to have been signed by Mr. Holmes on February 20, 1957. The application purporting to have been signed by Mr. Holmes on February 20, 1957 (Defendant's Exhibit 6) contains the following question and answer:

"12. Do you understand and agree that no insurance will be effected until the policy is issued? Yes."

A photocopy of Defendant's Exhibit 6 is found on page 51 of the record.

On this occasion Mr. Cadenhead informed Mr. Holland that Mr. Holmes had been killed on February 21st while piloting an airplane. The matter was discussed by Mr. Holland and Mr. Cadenhead and the latter carried back to Florence the application and Pilot History referred to.

Mr. Musgrove, called as a witness in behalf of the plaintiff, testified concerning a telephone conversation had with Mr. Holland in February or March of 1956, during which Holland asked permission to apply for a resident agent's license for Musgrove and Musgrove gave his permission. The details of this conversation, as testified to by Musgrove, are set out in the opinion below (266 F. 2d 273-274).

With reference to Musgrove's statement that Holland wanted him to be a "full agent" for the Aviation Accident Division of Continental Casualty Company and receive a

"full agency commission" the Court of Appeals stated as follows:

> "This is appellee's strongest evidence. However, this conversation took place prior to the issuance to Musgrove of a license by the State Department of Insurance at a time when Musgrove was not an agent of the Company. The term **'full agent' can only be reasonably construed as bringing into existence the status of principal and agent** of employer and employee, **not as conferring general agency powers** upon Musgrove." (Emphasis ours.) 266 F. 2d 278.

It was following this conversation, and some time in May, 1956, that Musgrove received from the Insurance Department of the State of Alabama a license as a resident agent for the Continental Casualty Company (R. 205). After the conversation regarding the license the policies (issued to Holmes and Culver) were sent back to Musgrove's office. Mr. Musgrove stated that these policies accompanied Mr. Holland's letter of May 7, 1956, directed to Mr. Cadenhead (R. 206-207). The letter referred to is identified as Third Party Defendants' Exhibit 2, and is set out in the margin of the opinion below (266 F. 2d, pages 272-273).

With reference to the license from the Insurance Department, the Court of Appeals stated:

> "Summarily, this certificate 'is only evidence of the existence of the agency in some form'." (266 F. 2d 278).

There was introduced and identified as Plaintiff's Exhibit No. 13 a request on a printed form from the Atlanta branch office to the general office in Chicago to license Musgrove as an individual resident agent. In this form request it was directed that certain information be furnished under the paragraph entitled "Applicant will re-

port business through." One page of Plaintiff's Exhibit 13 is set out in the opinion at page 279.

With reference to Plaintiff's Exhibit 13, the Court of Appeals stated:

> "We agree with appellant that it is without reason to interpret Plaintiff's Exhibit No. 13 as affording the basis of a finding that Musgrove was a general agent of the Company." (266 F. 2d 280).

The Court of Appeals, in discussing Plaintiff's Exhibit No. 13, failed to make reference to a card attached to and made a part of said exhibit. This card had places in which to indicate whether Musgrove was licensed as a "resident," "non-resident," "general agent," or "local agent." The card showed that he was licensed as a "resident" agent and was to submit business through the Atlanta branch office.

The Court of Appeals gave consideration to other factual matters insisted upon in behalf of Mrs. Holmes in establishing that Musgrove was a general agent of the Company. These other matters are referred to in the opinion on page 280.

The Court of Appeals considered only two of the Specifications of Error, in view of its determination that the District Court erred in refusing the defendant's motion for a directed verdict on the plaintiff's claim and in overruling the defendant's motion for a judgment notwithstanding the verdict.

The District Court, recognizing that the substantive law of Alabama applied (R. 731), instructed the jury that the burden was upon the plaintiff to reasonably satisfy the jury of the material allegations of the complaint (R. 733). The Court of Appeals also recognized that the substantive law of Alabama applied, as indicated by its reference to

the Alabama case law dealing with the power of an agent to bind the insurer and setting forth the test by which general agency is determined. In considering the evidentiary effect of the certificate or license issued to Musgrove by the Superintendent of Insurance of the State of Alabama, the Court of Appeals looked to and applied the law of Alabama.

After giving careful consideration to all of the evidence, including numerous original exhibits forwarded under order of the District Court, the Court of Appeals concluded that Musgrove was merely a "local," or "resident" agent, having the powers normally conferred on a "soliciting" agent. The Court of Appeals, applying the law of Alabama with respect to the authority of an agent to bind the company, held that Musgrove had neither actual nor apparent authority to bind the respondent under the alleged oral contract or agreement, and that the District Court should have granted the respondent's motion for a directed verdict.

The record shows that no form blank policies were in Musgrove's possession prior to the death of Mr. Holmes and it was undisputed that neither Mr. Holland nor any other employee of Continental knew of the alleged agreement until after Mr. Holmes' death. It was also undisputed that Mr. Holmes paid only the annual premium of $67.50 for the $50,000.00 policy covering flying as a **passenger** and that the company never received any portion of the premium of approximately $375.00 which would have been charged to cover the hazard of flying as a **pilot.**

ARGUMENT.

Preliminary Statement.

Some refinements of the questions presented in the Petition should be made and some differences between the procedure followed by the state courts of Alabama and Federal procedure should be kept in mind in order to avoid confusion as to questions presented in the Petition and the points discussed herein.

Question 1, as set forth in the Petition, has been restated on page 2 hereof for the purpose of focusing the Court's attention upon the fact that the real question involved is not whether the scintilla rule should have been given consideration in determining whether the verdict was supported by the evidence, but whether such rule should have been recognized by the Court of Appeals in giving effect to the procedure provided for by Rule 50 (b) and 28 U. S. C. A., Section 2106.

When a jury verdict is reviewed by the Supreme Court of Alabama, under the procedure provided for by state law, and the Court finds that the verdict is without evidentiary support, the case must be remanded for a new trial. However, in making such a review, the scintilla rule has no application. In **Pollard v. Rogers**, 234 Ala. 92, 173 So. 881, the Supreme Court of Alabama said:

> "It is the rule that where the verdict is contrary to the great preponderance of the evidence, defendant, on due motion, is entitled to a new trial, though the trial court was not in error in declining the affirmative charge. The scintilla of evidence rule does not apply as to the ruling on the motion."

The overriding question involved is whether the District Court could have directed the entry of a judgment,

either before or after the verdict, without violating the plaintiff's alleged right to a jury trial under state law, or whether the order of the Court of Appeals, directing (under the provisions of 28 U. S. C. A., Section 2106) the entry of a judgment for the defendant constituted an invasion of such alleged right.

The respondent insists it is well established that in the trial of civil cases in the Federal courts, including cases where jurisdiction is based upon diversity of citizenship the courts are not bound by state laws which conflict with the duty of the court to determine, before submitting a case to the jury, whether, as a matter of law, there is any evidence upon which a jury can properly find a verdict in favor of the party having the burden of proof; that if the court determines that a verdict against the party moving for a directed verdict would not stand it is not only the right, but the duty of the court to grant the motion.

The respondent concedes that the Court of Appeals should have followed the law of Alabama insofar as such law furnished a test by which to determine whether the agent had the power to bind the respondent under the oral agreement, or whether he had only those limited powers normally conferred upon a "soliciting" agent. The respondent says this was done and that a reference to the opinion of the Court of Appeals will so show.

Question 2, as set forth in the Petition, has been restated for the primary purpose of directing the Court's attention to the fact that under one phase of the question the petitioner is seeking a general review by this Court of the sufficiency of the evidence, and, under the second phase is attempting to assert that the action of the Court of Appeals in directing the entry of a judgment for respondent was in violation of the Seventh Amendment of the Constitution.

The respondent, of course, does not dispute the right of this Court to review the action of the Court of Appeals, but insists that the argument in respect to the constitutional question sought to be raised has been foreclosed by a number of decisions of this Court.

Case Primarily Involves Factual Questions.

When the Petition is stripped of the constitutional or procedural questions, which are either not directly involved or which have been decided adversely to the petitioner, it is apparent that this case presents only factual questions relating to the authority of an agent to bind the principal.

This is not an unusual insurance case, except that it involves a claim by the petitioner (plaintiff) that her deceased husband was insured under an alleged parol rider to a policy of insurance which she asserted afforded coverage as to a risk specifically excluded from the policy.

As the decision of the Court of Appeals was based upon conclusions as to facts peculiar to the particular case, it is difficult to conceive that the decision of the court below can be of particular importance except to the litigants involved herein. As is shown by the opinion of the Court of Appeals, there is no conflict among the decisions as to the legal principles decisive of the questions as to the authority of the agent.

Basically, the case is similar, except from factual standpoints, to numerous other cases involving the authority of an agent to accept risks or bind the company under an oral agreement. However, it is interesting to note that the petitioner has cited no case from Alabama, or any other jurisdiction, which would indicate the Court of Appeals did not reach the correct conclusion in deciding that the evidence was insufficient to show authority, either actual or apparent, of Musgrove to bind the respondent.

Questions Presented in Petition Were Not Raised in Lower Court.

Although it is apparent from the opinion of the lower court that the court applied the substantial evidence test, it nowhere appears that the attorneys for the petitioner argued that a different test should have been applied or that such question was considered by the lower court. In the application for rehearing, which we assume has been made a part of the record sent to this Court, the attorneys for Mrs. Holmes, at page 13 of the application, state the question presented thereunder as follows:

> "The question is whether or not there is any substantial evidence that Musgrove was a general agent."

Scintilla Rule Rejected by Federal Courts.

In conformity with decisions of this Court, the Court of Appeals, Fifth Circuit, has for many years declined to be governed by the scintilla of evidence rule of Alabama. In 1936 the Court of Appeals, Fifth Circuit, stated:

> "The scintilla of evidence rule which prevails in Alabama touching the direction of verdicts does not apply in the Federal courts sitting there." **Martin v. Burgess**, 82 F. 2d 321, 324.

In the Martin case the Court of Appeals cited **Pennsylvania RR. Co. v. Chamberlain**, 288 U. S. 333, 341. In the Chamberlain case this Court stated:

> "The scintilla rule has been definitely and repeatedly rejected so far as the Federal courts are concerned."

In the Chamberlain case this Court cited **Schuylkill & D. Improv. Co. v. Munson**, 14 Wall. 442, 448. In the Munson case this Court stated as follows:

> "Formerly it was held that if what is called a **scintilla** of evidence in support of a case the judge was bound to leave it to the jury, but the recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the **onus** of proof is imposed." 14 Wall. 448.

The rule enunciated in the Munson case in 1871 has been followed uniformly by the Federal courts, even in diversity cases, and the scintilla rule rejected.

According to the treatise by Morgan, **Choice of Law Governing Proof**, 58 Harvard Law Review 153, 178 (1944), cited in **Dick v. New York Life Ins. Co.**, 359 U. S. 437, Alabama and South Carolina are the only states in which the scintilla rule now obtains. As early as 1931 the Circuit Court of Appeals, Fourth Circuit, declared that the scintilla rule (of South Carolina) had never been approved by the Federal Courts. **South Carolina Aspargus G. Ass'n. v. Southern Ry. Co.**, 46 F. 2d 452. In 1944 the Court of Appeals, Fifth Circuit, in **White v. New York Life Ins. Co.**, 145 F. 2d 504, stated, with *respect to the scintilla rule of* Alabama as follows:

> "The rule of practice to the effect that a mere scintilla of evidence is sufficient to require submission to the jury has never obtained in Federal courts."

There is no diversity of opinion in the decisions of the Fourth Circuit and Fifth Circuit, or, for that matter in any of the decisions of the Federal courts, in respect to the scintilla rule.

Since it appears that South Carolina and Alabama are the only two states still adhering to the scintilla rule, a ref-

erence to the cases of the Fourth Circuit and Fifth Circuit will be of particular interest in determining whether there is lack of uniformity in the decisions of the lower courts. The Court of Appeals, Fourth Circuit, states, "What is known as the scintilla rule has never been approved by the Federal courts." 46 F. 2d 452. The Court of Appeals, Fifth Circuit, states, "The rule of practice to the effect that a mere scintilla of evidence is sufficient to require submission to the jury has never obtained in the Federal courts." 145 F. 2d 504, page 509. A reference to the two opinions from which we have quoted discloses that both courts cite **Gunning v. Cooley**, 281 U. S. 90, in which this Court stated that "A mere scintilla of evidence is not enough to require the submission of an issue to the jury."

Unless this Court should determine that the rule of practice still prevailing in the courts of South Carolina and Alabama should be followed in diversity cases pending in the Federal courts sitting in those states, there would seem to be no occasion for this Court to grant the Petition for a Writ of Certiorari.

In the treatise by Morgan, 58 Harvard Law Review, 153, 178, referred to above, the author states the following:

> "*In Alabama, however, the latest decisions declare* that the scintilla rule requires the submission to the jury of a case upon evidence so weak that the trial judge's refusal to grant a new trial after verdict based on that evidence constitutes reversible error. In these circumstances it is obviously impossible to argue that on the facts disclosed by the evidence a right-duty relationship is created by the law of Alabama, or even that Alabama puts the determination of that question in the province of the jury." 58 Harvard Law Review 178.

The author further states:

> "The fact that Alabama is willing to endure the expense, delay and inconvenience involved in submitting to the jury a question to which, as a matter of Alabama law, there can be but one answer can hardly be urged as a reason why the United States district court should commit a similar folly. This was certainly true before the Tompkins case. And it is difficult to believe that, so long as the court is bound to set aside a verdict based on a scintilla, the reasoning of that decision can be tortured into a justification for requiring a federal judge to follow the Alabama practice." 58 Harvard Law Review 178.

The treatise by Morgan refers to an Alabama statute (Title 7, Section 277, Code of Alabama, 1940, providing that "no more than two new trials can be granted to the same party in any cause"), which would complicate the handling of Federal court cases involving substantive law of Alabama. If a Federal judge were required to submit a case to the jury on a mere scintilla, and then set the verdict aside as being contrary to the weight of the evidence, it might become necessary to have three trials of the same case before a final disposition thereof.

The case of **Herron v. Southern Pacific Company**, 283 U. S. 91, very clearly establishes that a Federal court may direct a verdict notwithstanding a state law which would have required the submission of the case to the jury if tried in the state court. In that case the Court collected some of the earlier decisions and stated that a Federal court is not subject to state regulations, whether found in constitutional provisions or in statutes, providing that the Court "shall not direct a verdict, where the evidence is such that a verdict the other way would be set aside." 283 U. S. 95.

In the Herron case, this Court, speaking through Mr. Chief Justice Hughes, stated "the controlling principle

governing the decision of the present question is that the state laws cannot alter the essential character or function of a Federal court." 283 U. S., at page 94.

The Fourth Circuit, in the case of **Gorham v. Mutual Ben. Health & Accident Ass'n. of Omaha**, 114 F. 2d 91 (certiorari denied 312 U. S. 688), interpreted the decision in the Herron case as meaning that in the matter of direction of verdicts, the question must be decided by federal practice and is not one wherein local law or local decisions are binding.

In the recent case of **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525, this Court reversed the Court of Appeals, Fourth Circuit, and set aside its order directing the entry of a judgment. However, in the Byrd case, the Court recognized and reiterated the rule of the Herron case to the effect that state laws cannot be allowed to disrupt or alter the essential character or function of a Federal court.

Although the decision in the Byrd case is relied upon by the petitioner, the reasoning of the Court as applied to the questions therein presented is sufficient authority within itself for denying the Petition herein. The record in the instant case discloses that each of the parties had ample opportunity to present all available evidence material to the issues, and that the Court of Appeals gave careful consideration to each evidentiary point relied upon by petitioner as establishing authority of the agent to bind the respondent.

It is urged by the petitioner that the outcome of the instant case, instituted in a Federal court sitting in Alabama, should be the same as if tried in the state court. Respondent concedes that if the case had been tried in the state court, the case would have been submitted to the jury if the trial judge had concluded that a "gleam"

"glimmer" or "spark" of evidence supporting authority of the agent to make the alleged oral agreement had been adduced. **Ala. Great So. R. R. Co. v. Bishop**, 265 Ala. 118, 89 So. 2d 738, 743. We assume petitioner will concede that a verdict in favor of petitioner, based on no more than a **scintilla**, would have been set aside if returned upon a trial in a court of Alabama. The contention of the petitioner is to the effect that the District Court should be required to submit the case to the jury if it finds a scintilla of evidence which supports the petitioner's theory. The approval by this Court of such a contention would mean that the decisions of the Fourth Circuit and Fifth Circuit, rejecting the scintilla rule of South Carolina and Alabama, are wrong, and that District Courts sitting therein in diversity cases must no longer follow the more reasonable rule which has been accepted uniformly by the Federal courts since the decision in the Munson case, 14 Wall. 442, 448.

In the opinion in the recent case of **Dick v. New York Life Ins. Co.**, 359 U. S. 437, this Court referred to the disagreement among the lower courts as to whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. The cases referred to by the Court in this connection fail to reflect any disagreement in respect to the application of the scintilla rule. The question referred to was left undecided and among the reasons given for not entertaining the question was the fact that the Court of Appeals did not discuss the same. We have pointed out hereinabove that the question as to whether the scintilla rule was binding upon the Court of Appeals was not presented to that Court, and that the attorneys for the petitioner conceded that a different test should prevail.

In the Dick case, **Cooper v. Brown**, Third Circuit, 126 F. 2d 874, and **Diederick v. American News Co.**, ~~Fourth~~ Cir.

Tenth

cuit, 128 F. 2d 144, were referred to as representative cases presenting opposite views as to whether a state or federal test should be applied. A reference to the decisions in these cases discloses that both cases presented questions entirely different from those involved in the instant case. Furthermore, a reference to a later case of the Third Circuit, **Ettelson v. Metropolitan Life Ins. Co.**, 137 F. 2d 62, 65, shows that the Diederick case (Tenth Circuit) is among those cited in support of the statement that, "Well considered federal decisions have held that the division of function between court and jury in a federal court is to be made by federal, not state law." In the Ettelson case, the Court further stated, "This case is another of the instances in which a litigant, in federal court because of diversity of citizenship, has his rights determined by state law, but obtains them by the procedure available in all federal courts."

The record shows that the Court of Appeals followed the law of Alabama insofar as such law bore upon the rights of the parties to the litigation, but in respect to the question involving the function of the District Court, in considering the motion for a directed verdict, followed the practice prevailing in the Federal courts.

Decision and Order Below Not in Violation of Petitioner's Rights.

The petitioner insists that the Court of Appeals was wrong in holding that the evidence would not support a verdict in her favor, and that the further action of the Court in ordering a judgment entered for the defendant was in violation of the Seventh Amendment. We shall undertake to answer both of these contentions, without discussing at length the facts relied upon by petitioner as establishing authority of the agent to make the oral agreement.

The facts relied upon by petitioner as establishing substantial evidence that Musgrove had authority of a general agent were analyzed by the Court of Appeals, and the conclusion reached that there was no substantial evidence supporting the verdict. The fact that the Court of Appeals applied the law of Alabama is shown by the following excerpt from the opinion:

> "We state at the outset that the test to determine whether a general agency exists, in both Alabama case law and in general insurance law, is whether the agent 'has the power to bind the insurer by his contract of insurance, or to issue policies on his own initiative, or to accept risks, and if the agent has actual authority to do these things he is a general agent'; he may then bind the company in other ways, such as by oral contract, by waiving certain policy or application provisions and the like," 266 F. 2d 276, 277.

In the Petition, it is insisted that Musgrove's testimony to the effect that Holland stated in a telephone conversation that Musgrove would be a "full agent for the aviation accident division, special risk, department" (R. 202), is substantial evidence that Musgrove was a general agent of respondent at the time of the making of the alleged oral agreement. In the opinion of the Court of Appeals, it is pointed out that this conversation took place prior to the issuance to Musgrove of a license by the State Department of Insurance, and that the term "full agent" can only be reasonably construed as bringing into existence the status of principal and agent; or employer and employee, not as conferring general agency powers upon Musgrove. The Court of Appeals observed that this was petitioner's (appellee's) strongest evidence. At the time of the conversation between Holland and Musgrove the latter might be considered as having had some informal brokerage ar-

rangement with Continental, but his status as an agent did not come into being until the issuance of the license some three months later.

In the Petition, at pages 22-23, the Court of Appeals is criticized for its treatment of the evidentiary effect of the information on the license issued by the State of Alabama. An examination of the Alabama cases cited by the Court of Appeals will disclose that the Court of Appeals reached the same conclusion that would have been reached by the Supreme Court of Alabama.

Other phases of the evidence are referred to in the Petition, but the foregoing discussion is sufficient to point out that the Court of Appeals reached sound conclusions in considering the evidence relating to the question whether Musgrove had authority to change or extend the provisions of the policy.

The case of **Guaranty Trust Co. v. York**, 326 U. S. 99, is cited by petitioner in support of the argument that she should not be deprived of her judgment because of "the fortuitous circumstances of residence out of a State of one of the parties." It will be recalled that in the York case, this Court held that a Federal court, sitting in the State of New York, should not entertain an action which was barred by the statute of limitations of such state. Certainly no support for the petitioner's position can be found in the York case.

The basic question presented by the Petition is whether the judge-jury relationship in Federal courts, sitting in cases involving citizens of Alabama, is to be so disrupted as to prevent such courts from bringing litigation to a conclusion in an expeditious manner as allowed by Rule 50 (b), where the court concludes, as a matter of law, that a judgment against the party moving for a directed verdict could not stand.

Although the facts and questions presented in the recent case of **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525, were different from the facts and questions presented in this cause, the position of the respondent is supported by what was said in that case. We quote therefrom as follows:

> "We think that in the circumstances of this case the Federal court should not follow the state rule. It cannot be gainsaid that there is a strong Federal policy against allowing state rules to disrupt the judge-jury relationship in the Federal courts." 356 U. S. 538.

In the Byrd case, the Court referred to the case of **Herron v. Southern Pacific Co.**, 283 U. S. 91, having been decided prior to **Erie R. Co. v. Tompkins**, 304 U. S. 64, but the Court very clearly indicated approval of the decision in the Herron case to the effect that the District Court for Arizona was not bound by a provision of the Arizona Constitution relating to the submission of certain issues to the jury, and that the discharge of the judicial function (in directing a verdict for the defendant) "is an essential factor in the process for which the Federal Constitution provides." 283 U. S. 95.

In **Montgomery Ward & Co. v. Duncan**, 311 U. S. 243, the Court gave consideration to Rule 50 (b) and pointed out that "the rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other." 231 U. S. 250. The Court stated further, "Prior to the adoption of the rule, in order to accomplish this, it was necessary for the court to reserve the question of law raised by a motion to direct a verdict. The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution." 231 U. S. 250.

With reference to the procedure to be followed by the appellate court, this Court in the Montgomery Ward case, stated the following:

> "The appellate court may reverse the former action and itself enter judgment n. o. v. or it may reverse and remand for a new trial for errors of law." 311 U. S. 254.

The Court further stated that "the courts should so administer the rule as to accomplish all that is permissible under its terms." 231 U. S. 253.

In **Galloway v. United States**, 319 U. S. 372, the Court stated:

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50." 319 U. S. 389.

In the Galloway case the Court also stated:

> "Furthermore, the argument from history is not convincing. It is not that 'the rules of the common law' in 1791 deprived trial courts of power to withdraw cases from the jury, because not made out, or appellate courts of power to review such determinations. The jury was not absolute master of fact in 1791." 319 U. S. 389, 390.

Although some diversity of opinion is indicated in the earlier decisions in respect to the authority of a court of appeals to direct the entry of a judgment on account of insufficient evidence to support a verdict returned in the district court, where the question was not presented by

or reserved under a motion for a directed verdict, it is now well established under the decisions of this Court that a court of appeals may either direct the entry of a judgment notwithstanding the verdict or may reverse and remand for a new trial in the district court.

The decisions of this Court in Herron v. Southern Pacific Company and in Byrd v. Blue Ridge Cooperative show that there is a strong and compelling reason for holding that there should be a uniform rule governing the judicial function and the jury function under the Seventh Amendment of the Constitution, overriding the reasons sometimes given in the decisions that the state law, in diversity cases, should be applied to the extent of insuring that the outcome of a particular case should be the same in a Federal court as in a state court.

The decision in the Herron case still stands unaffected by the decision in Erie RR. Co. v. Tompkins, which, in construing what is now Section 1652 of Title 28, U. S. C. A. (formerly Section 725), changed only the rule formerly obtaining (Swift v. Tyson) to the effect that a Federal court was not bound to follow state decisions, in diversity cases, in determining general common law rules unaffected by statutes.

CONCLUSION.

In the foregoing the respondent has pointed out that no question is presented which justifies a review by this Court of the voluminous printed record and numerous original exhibits considered by the Court of Appeals in reaching the conclusion that this litigation should be terminated by a judgment in favor of the respondent.

The opinion of the Court of Appeals was written by the member thereof most familiar with the substantive law of Alabama. The heavily committed time of this Court would

not permit a more careful and painstaking review of the evidence than that indicated by the opinion of the court below.

The attorneys for petitioner urge some action by this Court which would result in the consideration of certain questions not presented below and, which, if considered, might not have changed the result.

The Petition amounts to an insistence that Federal courts, sitting in diversity cases involving substantive law of Alabama, cannot follow the procedure provided for by Rule 50 (b), and that such litigation cannot be terminated except through jury verdicts.

For the reasons presented hereinabove, it is respectfully insisted that the Petition should be denied.

Respectfully submitted,

.....

REID B. BARNES,
Exchange Security Bank Building,
Birmingham, Alabama,
Counsel for Respondent Continental Casualty Company.

JAMES A. SIMPSON,
WILLIAM L. CLARK,
LANGE, SIMPSON, ROBINSON & SOMERVILLE,
Of Counsel.

Certificate.

I hereby certify that true copies of the foregoing brief have been served upon Messrs. Truman M. Hobbs and Francis H. Hare, attorneys of record for petitioner, and I further certify that a true copy thereof has been served

upon Messrs. Mitchell & Poellnitz, attorneys of record for respondents, Musgrove Insurance Agency, a partnership composed of W. T. Musgrove and W. R. Cadenhead, and W. T. Musgrove and W. R. Cadenhead, individually.

This the ..... day of September, 1959.

.....

Reid B. Barnes,
Of Counsel for Respondent, Continental Casualty Company.

APPENDIX A.

Acts of Alabama, Regular Session, 1953, Volume 1, Act Number 193, pages 247-260, adopting uniform individual accident and sickness policy provisions, requires the following:

"(1) A provision as follows: Entire Contract; Changes: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the insurer and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions."

Title 28, Section 66, Code of Alabama of 1940, provides as follows:

"Sec. 66. Agents to be licensed; certificate.—Insurance companies not incorporated by the laws of the State of Alabama, but legally authorized to do business in this state, through regularly commissioned and licensed agents located in this state, shall not make contracts of insurance on life or property herein save through agents of such companies regularly commissioned and licensed to write policies of insurance in Alabama; but this chapter shall not apply to fire insurance companies covering actual property of railroad companies engaged in interstate commerce. Every insurance company licensed to do business in this state under the provisions of this chapter, shall obtain from the superintendent of insurance a certificate of authority for every individual agent writing or soliciting insurance for it in this state, and such certificate shall be renewable in January of each year."

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Supreme Court, U.S.
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SEP 29 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 346.

MRS. GLADYS LEITH HOLMES,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation, MUSGROVE INSURANCE AGENCY, a Partnership, Composed of W. T. Musgrove and W. R. Cadenhead, and W. T. MUSGROVE and W. R. CADENHEAD, Individually,
Respondents.

REPLY

To Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

FRANCIS H. HARE,
TRUMAN M. HOBBS,
Counsel for Petitioner.

Of Counsel:
HARE, WYNN and NEWELL,
703 Comer Building,
Birmingham, Alabama,
GODBOLD, HOBBS & COPELAND,
330 Professional Center Building,
Montgomery, Alabama.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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REPLY

To Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

I.

In its brief, respondent argues first that this Court should not grant certiorari because petitioner did not argue in the Court of Appeals that the sufficiency of the evidence was to be determined by a state test. As respondent concedes, however, when the Court of Appeals decided this case it made clear that it rejected the state test and applied a "federal" one. Thus the question raised in this

petition was clearly passed upon by the Court of Appeals. The test suggested by Supreme Court Rule 19 (b) is in terms of the holding by the Court of Appeals and not the argument of the parties in that Court.

Respondent cites no authority that a petitioner must have argued a question to the Court of Appeals in order to have it reviewed by this Court. Even in considering petitions for certiorari from state courts, the question need not have been argued in the state court if the state court passed on the question.

> "Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears. **Whitney v. California**, 274 U. S. 357, 360-1; **Manhattan Life Insurance Co. v. Cohen**, 234 U. S. 123, 134." Stern and Gressman, **Supreme Court Practice**, page 91 (2nd ed.).

This case demonstrates the unfairness of a requirement that a question be argued to the Court of Appeals in order to be reviewed by this Court. Petitioner believes that the evidence in this case abundantly supported the verdict of the jury under **any** test. But more importantly it would have been a waste of time to argue to the Court of Appeals that the well established rule of that circuit was erroneous. The Court of Appeals was not going to reverse an unbroken line of its decisions extending back for twenty years or more because of an argument by petitioner.

Respondent concedes the crucial fact that the Court of Appeals rejected the state test for determining sufficiency of the evidence and applied a federal one. It is this action by the Court of Appeals which is sought to be reviewed.

II.

The second argument of respondent is that the decision below was correct because this Court, the Fifth Circuit and the Fourth Circuit, have always refused to apply the scintilla of evidence rule. The decisions of this Court which it invokes are all prior to **Erie v. Tompkins**, 304 U. S. 64, and, therefore, are not in point.

Respondent is correct that the Fifth and Fourth Circuits reject the scintilla rule. But they do it because they are among the Circuits which insist that the sufficiency of the evidence is determined by a federal rather than a state standard. They have not carved out a special rule under which the scintilla test is ignored. For example, the Fifth Circuit in **N. Y. Life v. Sparkman**, 101 F. 2d 484, 485, states:

> "We do not agree with appellee that if there is a different rule in Florida for determining whether the evidence is sufficient to take a case to the jury than that obtaining in the Federal courts the Federal courts would be bound by it, for the question of whether the evidence makes an issue for a jury is one to be determined by the Federal courts by their own processes of reasoning and conclusion, and not according to any rule of standard which may be fixed for doing it by statutes or decisions of a state." And see **Ling v. Edenfield** (5 C. A.), 211 F. 2d 705. For a statement of this same rule from the Fourth Circuit see **McSweeney v. Prudential Ins. Co.** (4 C. A.), 128 F. 2d 660.

In the **Sparkman** and **McSweeney** cases the questions did not involve the scintilla of evidence rule. They involved questions very similar to the one presented in **Dick v. N. Y. Life**, 359 U. S. 437. It is obvious, therefore, that the Fourth and Fifth Circuits are in conflict with the Second, Third and Sixth Circuits on the basic question of

whether a state or federal test should determine the sufficiency of the evidence. The scintilla rule is merely one instance where these two circuits refuse to apply state standards to determine sufficiency of the evidence.

Cases from other circuits illustrate that they too have the problem of whether to apply a state or federal standard in determining sufficiency of the evidence, even though a scintilla rule is not involved. For example, in **Gutierrez v. Public Serv. Co.** (2 C. A.), 168 F. 2d 681, the Court of Appeals held that in a diversity case the sufficiency of the evidence was determined by the law of the forum state of New York and, therefore, the plaintiff had to show a **rational** basis for selecting his hypothesis over inconsistent ones pursuant to New York law rather than merely a possible hypothesis for a verdict which was the alleged federal test. And in **Rytex v. Ryan** (7 C. A.), 126 F. 2d 952, the Seventh Circuit held that it was bound to weigh the sufficiency of the evidence in a trademark infringement case according to the state test which required proof to be by "a clear preponderance of the evidence." And in ..... Moran v. Pittsburgh Steel, 166 F. 2d 908, the Court held the state standard for determining proof of proximate cause applied.

Of course it is not necessary for this Court to decide on a case by case basis whether the federal or state test is the proper test for proof where the issue might be trademark infringement, circumstantial evidence, proximate cause, contributory negligence or scintilla of evidence. This Court can and should, as was recognized in the **Dick** case, resolve the present conflict in the Circuits and lay down a clear rule for guidance of federal courts as to whether a state or federal sufficiency of the evidence test is applicable in diversity cases. This will resolve not only the problem with reference to the scintilla rule but the other problems that arise with reference to the state or federal test for determining sufficiency of the evidence.

We think this Court in **Stoner v. New York Life**, 311 U. S. 464; and **Guaranty Trust Co. v. York**, 326 U. S. 99, has already indicated that the state test is the one to be applied except where the state rule conflicts with the federal policy favoring jury decisions or infringes on the guarantee of the Seventh Amendment. **Byrd v. Blue Ridge Cooperative**, 356 U. S. 99. Plainly the Alabama scintilla rule implements rather than conflicts with the federal policy favoring jury decisions.

Respondent urges that the Court of Appeals properly denied petitioner a trial by jury even though she was assured of one in the state court because the Alabama scintilla rule would be time consuming and would unduly burden federal courts. It does not work out this way in the Alabama courts, nor would it in the federal system. Respondent complains that the scintilla rule in Alabama requires a new trial rather than a directed verdict, but this Court has itself commended as better practice the remanding of a case for a new trial than having an appellate court enter judgment. **Cone v. West Virginia Paper Co.**, 330 U. S. 212, 215.

If time and expense were the only considerations, a new trial would never be granted where the appellate court is of the opinion that the evidence does not support the judgment. Jury trials are themselves time consuming and expensive. This Court has never equated the saving of time with its obligation to protect and make meaningful the guarantee of a right to a jury trial. The Alabama scintilla rule gives substance and effect to the guarantee of trial by jury.

There is no merit to respondent's argument that the application of the scintilla rule in federal courts will create problems under Title 7, Section 277, Code of Alabama (1940), which provides that "no more than two new trials can be granted the same party in any cause." In **Doe v. Finnegan**, 216 Ala. 431, 113 So. 277, the Alabama Supreme

Court discussed similar statutes in some **nine** other jurisdictions, and stated:

> "The obvious meaning of our statute is that no more than two new trials can be had on the merits and the same issues of fact, where such issues are fairly presented and left to the trier's of fact upon proper evidence and instructions, and there being legal evidence before the court to support the verdict or judgment rendered . . ."

This statute limiting the number of new trials in Alabama and the similar statutes in many other states are either applicable or inapplicable in federal courts without regard to the scintilla rule.

Under Alabama and federal practice, the trial judge has the power to set aside verdicts where the mere weight of the evidence is insufficient. If the verdict in this case had been viewed by the trial judge as against the weight of the evidence, petitioner would have been granted a new trial, but because the trial judge viewed the evidence as so strong that he overruled the new trial motion, respondent appealed and an appellate court viewed a cold record and ordered judgment for respondent. It is anomalous that if petitioner's evidence had been weaker, she would have been granted a new trial by the trial judge and respondent would not have appealed. We submit the Alabama scintilla rule is in accord with the policy of this Court. What violates the policy of this Court is the action of the Court of Appeals in denying this petitioner the jury trial assured her under state practice and under circumstances where the trial judge believed the evidence was too strong even to grant a new trial. Certainly there is nothing about the Alabama scintilla rule that would require this Court to make an exception of the rule for which we contend, i. e., that federal courts in diversity cases should apply a state test in determining the sufficiency of the evidence.

III.

Respondent relies on **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525, which cited **Herron v. Southern Pacific Co.**, 283 U. S. 91, for the proposition that the scintilla rule of Alabama should not be allowed to disrupt the "judge-jury relationship" in Federal courts so "as to prevent such courts from bringing litigation to a conclusion in as expeditious manner as allowed by Rule 50 (b)."

We agree that there should be "a strong Federal policy against allowing state rules to disrupt the judge-jury relationship in the Federal courts." Particularly is this so, when, as in **Byrd**, the state rule converts a normal fact question into a question of law with overtones of infringement on the scope of the Seventh Amendment. See also the analogous situation in **Gibson v. Phillips Petroleum Co.**, 352 U. S. 874.

However, we cannot understand how the "judge jury relationship in the Federal Courts" can be disrupted by following the scintilla rule of Alabama. Neither can we see how the exercise of Rule 50 (b) by appellate courts can be hampered at all by following the scintilla rule.

This Court has taught that federal courts in diversity actions should apply the state rules on burden of proof, which directly affect whether or not the issue will go to the jury. **Palmer v. Hoffman**, 318 U. S. 109, 116-7; **Cities Service Oil Co. v. Dunlop**, 308 U. S. 208. As we understand **Stoner v. New York Life Ins. Co.**, 311 U. S. 464, this Court there directed that the Federal courts apply a state standard for determining the sufficiency of evidence to support a jury verdict—it appears that the Fourth and Fifth Circuits have ignored the mandate of **Stoner**. Likewise, in many instances federal rules of procedure have yielded to state rules of procedure which affect substantive rights of parties. See **Ragan v. Merchants Transfer &**

Warehouse Company, Inc., 337 U. S. 530 (Rule 3); **Woods v. Interstate Realty Co.**, 337 U. S. 535 (Rule 17b); **Cohen v. Beneficial Industrial Corp.**, 337 U. S. 451 (Rule 23). The total import of these decisions is an assurance of uniformity of result under the rule of **Erie.**

Though confronted with the **Palmer, Dunlop, Stoner, Ragan, Woods** and **Cohen** decisions, the Courts of Appeal for the Fourth, Fifth and possibly Tenth Circuits have applied federal rather than state rules for determining the sufficiency of the evidence to support a jury verdict.

The question, of course, as posed by this Court in **Guaranty Trust Co. v. York**, 326 4-5-99, is whether there will be a substantially different outcome if the Federal courts reject the state scintilla test. The answer is obviously yes. In the few cases where the scintilla rule would apply, the trial court could not direct a verdict or enter a judgment notwithstanding the verdict if a scintilla of evidence was present. The appellate court, as in the case at bar, would be precluded from rendering the case for an appellant where a scintilla of evidence existed. The remedy would be a new trial. Clearly, a new trial in lieu of an adverse judgment in such a situation is a substantial right afforded by Alabama courts.

The purpose of Rule 50 (b) would be no more frustrated or hampered by federal courts applying the scintilla rule than were Rules 3, 17 (b), and 23 affected by following state practice in **Ragan, Woods** and **Cohen**, supra.

Respondent argues that an adoption of the scintilla rule would disrupt the "judge-jury" relationship in Federal courts, but the only effect of this rule would be to grant an appellee a new trial rather than permitting judgment to be rendered against him. This rule would, therefore, implement rather than disrupt the "judge-jury relationship" which this Court stated in **Byrd** it was seeking to

foster. Also it would retard further encroachments on the Seventh Amendment and would further the better practice of granting new trials as outlined in **Cone**.

IV.

Respondent asserts that the constitutional question of whether the Court of Appeals could reverse this case because of an insufficiency of the evidence has been foreclosed by a number of decisions of this Court. The cases on which respondent relies for this proposition were not even cases where an appellate court was reversing the trial court. They were cases where a trial judge had directed a verdict.

But petitioner is not arguing in this reply petition, the abstraction of whether a federal court has the power in a proper case to reverse and render for insufficiency of the evidence. (Certainly the better practice would be to remand the case for a new trial where the trial judge believed the evidence too strong to even grant motion for new trial.) Petitioner is contending that the technique of the Fifth Circuit in this case renders the Seventh Amendment meaningless. This Court is not required to search the record to determine manifest error because sufficient evidence is recited in the Court's opinion.

The Court of Appeals simply substituted its view for that of the jury—even in determining the credibility of conflicting testimony. For example, respondent's own office memorandum, Exhibit 13, categorically referred to the Musgrove Agency as a general agency. In conflict with this evidence was the testimony of Holland which sought to explain away this admission. Apparently neither the jury nor the trial judge was impressed with Holland's testimony. But the Appellate Court in reviewing a printed record denied any evidentiary weight to respondent's admission by stating that "Holland testified unequivocally."

If the Seventh Amendment means anything, it means that conflicts in the testimony are for the jury.

Professor Wright in his article **The Doubtful Omniscience of Appellate Courts**, 41 Minn. Law Review 751, points out that appellate courts "are inventing new procedural devices by which the mastery of the litigation process can be made direct rather than devious," and by which "unwise or unwanted" jury verdicts can always be rejected.

We are aware that the cry "violation of Seventh Amendment" is overworked, but the technique employed by the Fifth Circuit in this case makes an empty ritual of any trial by jury. In all earnestness we submit that without a look at the record of this case and on the opinion of the Court of Appeals alone, this Court should categorically reject this newest procedure of the Fifth Circuit for nullifying the verdict of the jury.

Realistically, and as a practical matter, this Court must know that not always as here will the agent come before the jury and admit that he was appointed a general agent. It is not always, as here, that discovery will uncover a carbon copy of the application labelling him a general agent. In the usual case all that the ordinary citizen can ever expect to produce is the evidence which the Alabama cases have always said was enough:

1. That the agent solicited insurance;
2. That the agent countersigned and issued policies;
3. That the agent received and collected premiums.

United Burial v. Collier, 139 So 104, 139 S. 106, and Alabama Code 1940, Title 9, 68, 69 and 73, say so.

If this opinion stands, any insurance company similarly situated wishing to repudiate the authority of the agent, who is **without a written agency contract**, has only to cite this decision and avoid the payment of its obligation.

If that is not true, we simply would not know how to tell a widow to collect her insurance.

Respectfully submitted,

.....

FRANCIS HARE,

.....

TRUMAN HOBBS,

Counsel for Petitioner.

Certificate.

I hereby certify that a true copy of the foregoing brief has been served upon Messrs. Lange, Simpson, Robinson & Somerville, attorneys of record for respondent, Continental Casualty Company, and I further certify that a true copy thereof has been served upon Messrs. Mitchell and Poellnitz, attorneys of record for respondents, Musgrove Insurance Agency, a partnership composed of W. T. Musgrove and W. R. Cadenhead, and W. T. Musgrove and W. R. Cadenhead, individually.

This the ... day of ....., 1959.

.....

Truman M. Hobbs,

Of Counsel for Petitioner,

Mrs. Gladys Leith Holmes.

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IN THE

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OCTOBER TERM, 1959.

No. 346.

MRS. GLADYS LEITH HOLMES,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY et al.,
Respondents.

SUPPLEMENTAL BRIEF

Of Respondent, Continental Casualty Company,
In Opposition.

REID B. BARNES,
Exchange Security Bank Building,
Birmingham, Alabama,
Counsel for Respondent, Continental
Casualty Company.

JAMES A. SIMPSON,
WILLIAM L. CLARK,
LANGE, SIMPSON, ROBINSON & SOMERVILLE,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-6477.

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SUPPLEMENTAL BRIEF

Of Respondent, Continental Casualty Company, In Opposition.

I.

Some of the confusion presented by this case can be clarified if we are successful in pointing out that the petitioner ignores the fact that the Court of Appeals followed the standard set by the law of Alabama in determining whether the agent had authority to make the oral contract relied upon, and, after determining the agent did not have such authority, followed the procedure provided for by Rule 50 (b).

The reply filed in behalf of petitioner indicates that petitioner is not willing to admit, in clear and unequivocal language, that the basic question presented is not whether the Court of Appeals applied the wrong "test" in determining whether the District Court erred in refusing respondent's (defendant's) motion for a directed verdict, but whether the Court of Appeals had authority to order the entry of a judgment for respondent, after reaching the conclusion that, as a matter of law, such a judgment should have been entered at the conclusion of the trial in the District Court.

In the petitioner's reply, it is stated that the respondent concedes that the Court of Appeals "rejected the state test and applied a 'federal one' ". This is a distortion of a statement appearing in the first paragraph on page 15 of respondent's initial brief in opposition, by which respondent was undertaking to point out that the questions presented in the Petition were not raised in the lower court. The respondent says that the Court of Appeals, in considering the two questions raised under specifications of error 1 and 2 (based upon the refusal of the District Court to grant the motion for directed verdict and upon the refusal of the District Court to grant the motion for judgment notwithstanding the verdict) did that which is done uniformly by all of the circuit courts, and did that which the Supreme Court of Alabama would have done if it had been called upon to determine whether the verdict should be permitted to stand. In such event the Supreme Court of Alabama would not have applied the scintilla rule but would have reversed and remanded if it had found, as did the Court of Appeals, that there was no substantial basis for the verdict.

Where the question arises as to whether the plaintiff has presented sufficient evidence to sustain the cause of action alleged, or where the question is raised as to

whether the defendant has established a defense which is relied upon to defeat the action, the courts look to that law which governs the rights and duties of the parties. In this case the District Court and the Court of Appeals followed the law of Alabama in respect to the burden of proof and the test by which to measure the authority of the agent. The Court of Appeals, after concluding that the District Court should have directed a verdict for the defendant, was not required to determine whether Alabama procedure would permit the direction of a verdict, or whether under Alabama procedure a new trial would have to be ordered. It is on this point that the respondent differs with the petitioner.

The respondent says that the Court of Appeals followed the mandate of **Erie v. Tompkins**, 304 U. S. 64, insofar as the state law bore upon the questions presented, as is indicated by the various references to Alabama case law. Certainly, it cannot successfully be contended that the Erie case overruled **Herron v. Southern Pacific Company**, 283 U. S. 91, or that the Erie case changed the rule relating to the respective functions of judge and jury in the trial of cases in the Federal Courts.

We trust the foregoing is sufficient to emphasize the importance of not confusing the action of the Court of Appeals in determining whether the verdict of the jury should be permitted to stand with the action of the Court in directing the District Court to enter a judgment for the defendant.

II.

Petitioner admits that there is no diversity of opinion in the Fifth and Fourth Circuits regarding the rejection of the scintilla rule, but says that "they do it because they are among the Circuits which insist that the sufficiency of the evidence is determined by a federal rather than a

state standard. They have not carved out a special rule under which the scintilla test is ignored."

We respectfully differ with the foregoing statement of the petitioner and submit that the error in such statement can be demonstrated by a reference to the opinions of the Fourth and Fifth Circuits in which the scintilla rule has been rejected.

In the Fifth Circuit case of **Martin v. Burgess**, 82 F. 2d 321, 324, the court followed Alabama law in respect to presumptions and burden of proof, as indicated by the following:

> "In Alabama proof that the truck was defendant's raises an administrative presumption that its use was authorized at the time and place of the collision, so as to put the burden of explanation on the defendant; but the presumption is not evidence, and serves only to impose upon the defendant the burden of showing that the driver was not his agent, or, if he was, that he was not acting within the scope of his authority or in the course of his employment, Toranto v. Hattaway, 219 Ala. 520, 122 So. 816; and the proof ought to be clear and convincing, Rooks v. Swift & Co., 210 Ala. 364, 98 So. 16. But when it is shown without contradiction that the defendant's vehicle was used without his authority at the time and place, a verdict against him cannot stand."

After determining that, under Alabama law, the verdict should not stand the Court of Appeals cited the case of **Pennsylvania R. R. Co. v. Chamberlain**, 288 U. S. 333, 341, in support of the conclusion that a verdict should be directed for the defendant.

The foregoing shows that the Fifth Circuit was following the so-called "state test", as was done in the instant case, until it reached the conclusion that the verdict could

not stand. Thereupon, it reverted to a recognition of the rule enunciated in the case of **Schuylkill & D. Improv. Co. v. Munson**, 14 Wall. 442, 448.

In the Fifth Circuit case of **White v. New York Life Ins. Co.**, 145 F. 2d 504, the court followed Alabama law as to the basic question presented, as indicated by the following:

> "As this suit is founded upon an Alabama contract the applicable rule must be determined by Alabama law" (145 F. 2d 507).

In the White case the court, after concluding that, under Alabama law, the plaintiff had not met the burden imposed upon her, observed as follows:

> "In the Federal courts where the evidence in favor of one party is so overwhelming that the judge in the exercise of sound discretion would be obliged to grant a new trial if the jury rendered a verdict in favor of the other party, it is his duty to direct a verdict. The rule of practice to the effect that a mere scintilla of evidence is sufficient to require submission to the jury has never obtained in the Federal courts."

The Court of Appeals at this point cites a number of decisions of this Court, including the following:

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333;
Gunning v. Cooley, 281 U. S. 90;
Galloway v. United States, 319 U. S. 372;
Slocum v. New York L. Ins. Co., 228 U. S. 364, 369.

In the footnote of the opinion in the White case there is the following quotation from the Slocum case:

> "'When, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the

> case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party'" (145 F. 2d 509).

The decisions of the Fifth Circuit in the Martin and White cases, supra, show that the scintilla rule has not been rejected because it is a "state test," but because it would prevent the judge from discharging his duty to direct a verdict where the conclusion is reached, as a matter of law, that a verdict against the party moving for a directed verdict would not be permitted to stand.

III.

Petitioner, at page 3 of the reply, quotes from the Fifth Circuit case of **N. Y. Life v. Sparkman**, 101 F. 2d 484, 485, and makes it appear that the court declined to follow the law of Florida. It will be observed from a reference to the opinion in the Sparkman case that immediately following the statement quoted in petitioner's reply the court cited the case of **Herron v. Southern Pacific Co.**, 283 U. S. 91, and that immediately following the citation of the Herron case the court observed:

> "But we find no substantial difference between the Federal and state authorities in the statement and application of the rule that where the proof shows a violent death not self-inflicted and no more, there should be a finding of accidental death, but that where, as here, it shows death by violence self-inflicted, it must go further to show that the circumstances of the self-infliction, are, if not inconsistent with the theory of suicide, at least consistent with that of accident" (101 F. 2d 485).

When the opinions of the Fifth Circuit, including the opinion in the instant case, are analyzed, it becomes obvious that the Fifth Circuit does not insist "that the suffi-

ciency of the evidence is determined by a federal rather than a state standard," as stated on page 3 of petitioner's reply.

IV.

Respondent recognizes that it is difficult if not impossible to reconcile all of the decisions of the various courts dealing with any given question involving conflicts of laws, but unless this Court should render a decision that qualifies the opinions in Herron v. Southern Pacific Co., supra, and in **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525, the rule as to the functions and duty of the court, in respect to the questions of law raised by a motion for a directed verdict and by a motion for judgment notwithstanding the verdict will be, and remain, clear and settled for all time.

V.

Petitioner insists "it is not necessary for this Court to decide on a case by case basis whether the federal or state test is the proper test for proof" (page 4 of petitioner's reply), and that this Court should resolve the conflict among the Circuits for guidance of federal courts. Respondent respectfully insists that there is no conflict among the Circuits as to the overriding question sought to be presented by the petitioner and that there is now a uniform rule governing the judicial function and the jury function under the Seventh Amendment of the Constitution.

It will be recalled that in the recent case of **Kissinger v. E. I. Du Pont De Nemours & Company**, 79 S. Ct. 736, the petitioner contended that the Fifth Circuit violated his rights to a jury trial under the Seventh Amendment of the Constitution by reversing the judgment of the District Court of the Northern District of Alabama and in entering a judgment for the appellee, and that this Court

denied certiorari. In the concurring opinion in the Kissinger case, written by the Chief Judge, the following appears:

> "I know that it has become the fashion in some quarters to consider that a trial by jury means a trial by jury alone in which the jury determines not only what the facts are but whether they are sufficient as matter of law to make out a case. This is not yet the rule in the State Courts of Alabama, nor is it the rule in the Federal Courts of that state and this circuit" (259 F. 2d 420).

It is quite natural that every unsuccessful litigant should desire a new trial in lieu of an adverse judgment, but neither state nor federal judges can surrender their functions to the jury without destroying our system of laws.

VI.

In the reply filed in behalf of petitioner the case of **Cone v. West Virginia Paper Co.**, 330 U. S. 212, 215, is cited in support of the contention that it is better practice to remand a case for a new trial than for the appellate court to enter a judgment. Although certain statements in the opinion in the Cone case, if taken out of context, could be relied upon as supporting the practice contended for by petitioner, the decision in that case should be viewed in the light of the fact that the Court was there dealing with the question whether the Court of Appeals, Fourth Circuit, was authorized to direct the entry of a judgment for defendant, where the defendant had moved for a directed verdict without moving for a judgment notwithstanding the verdict, as provided for by Rule 50 (b). In the Cone case this Court stated as follows:

> "In the absence of such a motion (for judgment notwithstanding the verdict) we think the appellate

court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand" (Supplied) (330 U. S. 218).

When considered in the light of the question presented in the Cone case, the decision therein cannot be interpreted as supporting the argument of petitioner that the Court of Appeals should have remanded the case for a new trial, in lieu of directing the entry of a judgment for the defendant.

VII.

As we understand it, the petitioner, in the reply, is arguing that Federal rules of procedure must yield to the scintilla rule of Alabama. In this connection petitioner refers to **Ragan v. Merchants Transfer & Warehouse Company**, 337 U. S. 530 (Rule 3); **Woods v. Center State Realty Company**, 337 U. S. 535 (Rule 17 b) and **Cohen v. Beneficial Industrial Corp.**, 337 U. S. 451 (Rule 23).

In the Ragan case this Court approved the decision of the Court of Appeals, Tenth Circuit, to the effect that Rule 3 should not be so construed as to permit the prosecution to judgment of an action which under the law of Kansas was barred by the statute of limitations at the time of service of process upon the defendant, in that service of process was an integral part of the Kansas statute of limitations, citing **Guaranty Trust Co. v. York**, 326 U. S. 99.

In the Woods case, it was held that an action could not be brought against a citizen of Mississippi in a Federal court sitting in that state, where, under state law, the doors of the state court had been closed against such action. This Court again followed the rule of the York case.

In **Cohen v. Beneficial Industrial Loan Corp.**, this Court, under the policy of **Guaranty Trust Co. v. York**, held that

a statute of New Jersey, relating to security for counsel fees and expenses as a condition to the maintenance of a stockholder's derivative action should be recognized and given effect in the Federal Courts of New Jersey.

If any of the foregoing cases is susceptible of being interpreted as meaning that Federal rules of procedure must yield to state laws, which respondent doubts, then such cases could be urged with equal force in support of a contention that any or all of the Federal rules of procedure must yield to state laws now in effect and that such rules could be nullified by state laws which might be adopted hereafter.

Of course, it is obvious that none of the cases discussed above deals with the respective functions of judge and jury in the trial of diversity cases in Federal Courts and it seems that petitioner is going far afield in her effort to establish that the scintilla rule prevailing in the state courts of Alabama applies in diversity cases tried in the Federal Court sitting in that state and that Rule 50 (b) must no longer be given effect in the trial of such cases.

VIII.

If this Court should ever hold that the scintilla rule must be recognized in diversity cases tried in the Federal Court sitting in Alabama, such holding would, of necessity, have the effect of declaring that other state rules, now in effect or hereafter adopted, must also prevail.

For example, the present rule recognized in the State Courts of Alabama and providing that counsel have the right to argue the case before the jury, even where the trial court has made known that it will give an affirmative charge with hypothesis, would have to be followed, and the District Court burdened with hearing arguments and instructing the jury on the issues in the case after the

court has determined that a verdict contrary to the instruction to be given would not be permitted to stand. The latter rule is referred to in **Harris v. State**, 215 Ala. 56, 109 So. 291, which, incidentally, is not a criminal case, as the style might indicate.

The foregoing discussion is engaged in for illustrative purposes only, as time would not permit us to discuss other state rules which would have to be recognized and followed in diversity cases to the exclusion of the Federal Rules of Civil Procedure if the position contended for by petitioner should be carried to its logical conclusion.

CONCLUSION.

For the reasons presented hereinabove and in the initial brief of respondent, it is respectfully insisted that the petition should be overruled.

Respectfully submitted,

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REID B. BARNES,
Exchange Security Bank Building,
Birmingham, Alabama,
Counsel for Respondent, Continental Casualty Company.

JAMES A. SIMPSON,
WILLIAM L. CLARK,
LANGE, SIMPSON, ROBINSON & SOMERVILLE,
Of Counsel.

Certificate.

I hereby certify that true copies of the foregoing supplemental brief have been served upon Messrs. Truman M. Hobbs and Francis H. Hare, attorneys of record for peti-

tioner, and I further certify that a true copy thereof has been served upon Messrs. Mitchell & Poellnitz, attorneys of record for respondents, Musgrove Insurance Agency, a partnership composed of W. T. Musgrove and W. R. Cadenhead, and W. T. Musgrove and W. R. Cadenhead, individually.

This the ... day of October, 1959.

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Reid B. Barnes,
Of Counsel for Respondent, Continental Casualty Company.